

2010

# Ron Patterson v. Randy D. Patterson : Brief of Appellant

Utah Court of Appeals

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IN THE SUPREME COURT OF UTAH

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RON PATTERSON,

Plaintiff, Petitioner, and  
Appellee,

v.

RANDY D. PATTERSON, as Trustee of  
the Darlene Patterson Family Protection  
Trust: ESTATE OF DARLENE  
PATTERSON; JUDY ANN HENRY;  
RANDY D. PATTERSON; GARY E.  
PATTERSON; REX A. PETERSON;  
VICKY D. ROMERO; RICKY A.  
PATTERSON; and/ or JOHN DOES 1-10  
and JANE DOES 1-10,

Defendants, Respondents  
and Appellants,

BRIEF OF APPELLANT

Appeal No. 20100011-SC

District Court No. 070700586

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BRIEF OF APPELLANT

---

APPEAL OF THE SUMMARY JUDGMENT ORDER AND RULING  
ENTERED BY THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY,  
STATE OF UTAH, THE HONORABLE JUDGE MICHAEL G. ALLPHIN PRESIDING

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(ORAL ARGUMENT REQUESTED)

FILED  
UTAH APPELLATE COURTS

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### **STATEMENT OF JURISDICTION**

This is an interlocutory appeal from the summary judgment entered by the Second District Court of Davis County. The Supreme Court granted the Appellant's Petition for Interlocutory Appeal on February 11, 2010 (R. at 651-53).

Jurisdiction in this matter is conferred upon the Supreme Court of Utah pursuant to Utah Code Ann. § 78A-3-102(3)(j) (2009) and because the Order from which Defendants are appealing is an order of a court of record over which the Court of Appeals does not have original appellate jurisdiction.

### **STATEMENT OF THE ISSUE PRESENTED FOR APPELLATE REVIEW**

Whether the trustor of a revocable trust which explicitly provides the trustor with powers of amendment, modification, or revocation of the trust, "in whole or in part," has the power to intentionally divest, by written amendment or partial revocation, a contingent beneficiary's interest in the trust and particularly after said beneficiary abuses and commits multiple felonies against the trustor, if the trust also contains a provision stating that "[t]he interests of the beneficiaries are presently vested interests subject to divestment which shall continue until [the] Trust is revoked or terminated other than by death." (R. at 326-35, 422-36, 442-57, 625-28).

Standard of Review: Correctness.

Authority for Standard of Review: The validity of a trust is an issue of law, reviewed for correctness. *Flake v. Flake*, 2003 UT 17, ¶8, 71 P.3d 589; *Groesbeck v. Groesbeck*, 935 P.2d 1255, 1257 (Utah 1997). So long as the reviewing court confines its analysis to the

language of the trust instrument and does not resort to extrinsic evidence of intent, the interpretation of a trust is an issue of law. *Hoggan v. Hoggan*, 2007 UT 78, ¶7, 169 P.3d 750; *Kimball v. Campbell*, 699 P.2d 714, 716 (Utah 1985) (“A contract’s interpretation may be either a question of law, determined by the words of the agreement, or a question of fact, determined by extrinsic evidence of intent”).

Further, summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c); *Gerbich v. Numed, Inc.*, 1999 UT 37, ¶10, 977 P.2d 1205. When reviewing the trial court’s ruling in a motion for summary judgment, the reviewing court considers all facts and inferences to be drawn therefrom in the light most favorable to the nonmoving party. *Peterson v. Sunrider Corp.*, 2002 UT 43, ¶13, 48 P.3d 918. The reviewing court reviews the trial court’s grant of summary judgment for correctness, according no deference to that court’s legal conclusions. *Oxendine v. Overturf*, 1999 UT 4, ¶7, 973 P.2d 417; *State v. Pena*, 869 P.2d 932, 936 (Utah 1994). In addition, the reviewing court may affirm a grant of summary judgment on any ground available to the trial court, even if it was not relied upon below. *Bailey v. Boyles*, 2002 UT 58, ¶10, 52 P.3d 1158; *Higgins v. Salt Lake County*, 855 P.2d 231, 235 (Utah 1993).

### **DETERMINATIVE PROVISIONS OF LAW**

Utah Code Ann. § 75-7-605(2009) and Utah Code Ann. § 75-7-606 (2009) are statutes that are determinative, or of central importance, to this appeal. Additionally, this court’s interpretation of and review of the case of *Banks v. Means*, 2002 UT 65, 52 P.3d 1190, and

its progeny, *Flake v. Flake*, 2003 UT 17, 71 P.3d 589 and *Hoggan v. Hoggan*, 2007 UT 78, 169 P.3d 750, is determinative of, and of central importance to, this appeal. The aforementioned statutes and cases are attached hereto as Addendum, Exhibit A.

### **STATEMENT OF THE CASE**

#### **A. Nature of the Case**

This appeal arises from the Order Granting Plaintiff's Motion for Partial Summary Judgment and Denying Defendants' Counter Motion for Partial Summary Judgment (the "Order"), entered on December 21, 2009 by the Second District Court, Davis County, State of Utah, the Honorable Michael G. Allphin presiding. (R. at 633-35, attached hereto as Addendum, Exhibit B). The Order was affected by a Ruling on Plaintiff's and Defendants' Cross Motions for Partial Summary Judgment (the "Ruling"), that was entered by the aforementioned court on November 30, 2009. (R. at 622-29, attached hereto as Addendum, Exhibit C).

This action, at its most basic level, concerns the interpretation of trust documents, including the Darlene Patterson Family Protection Trust (the "Family Trust"), created and executed by Darlene Patterson ("Darlene") during her lifetime, and the effect of a written and express partial revocation of this Family Trust whereby, Darlene, as trustee, undisputedly attempted to modify the terms of the Family Trust so that Ron Patterson ("Ron") was no longer a beneficiary. Before Darlene attempted to partially revoke the Family Trust, thereby excluding Ron as a beneficiary, Ron committed several crimes against Darlene. Ron was prosecuted for the felony crime of "Elder Abuse" or "Exploitation of an Elder", which after

negotiations was reduced to a felony attempt charge of the same crime. Darlene was the complaining witness. In connection with his conviction, Ron was ordered to pay restitution to Darlene in the amount of \$52,935.00, and was sentenced to jail and probation. *See* Addendum, Exhibit D. Ron also has admitted to unlawfully using Darlene's credit card without authorization to make personal purchases. *See* Supplemental and Corrected Affidavit of Randy Patterson, attached hereto as Addendum, Exhibit E, (R. at 474, ¶¶4-5). Ron was also the recipient of previous gifts from Darlene. *See* Final Amendment referenced below.

After Darlene's death, Ron initiated this action, which pertains primarily to the parties' dispute over the distribution of the Family Trust's property and the propriety of the trust's modifications executed by Darlene prior to her death; more specifically, the validity of a Final Amendment executed by Darlene after Ron committed the Elder Abuse crimes against her whereby she stated she had provided for Ron during her lifetime and wished to remove Ron as a beneficiary from the Family Trust.

The court's November 30, 2009 Ruling found that Darlene's modification to the Family Trust, made on May 30, 2006, which effectively removed Ron as a beneficiary, was invalid due to its complete divestment of Ron's vested interest in the Family Trust's property without a complete revocation of the Family Trust, as the court determined is required by the trust's terms. To come to this decision, the trial court relied heavily on and stated it was bound by and must follow the Utah Supreme Court's precedent in *Banks*, *Flake*, and *Hoggan* (attached hereto as Addendum, Exhibit A).

Randy Patterson (“Randy”), both individually and as trustee of the Family Trust, appeals the Order and Ruling granting Plaintiff’s Motion for Partial Summary Judgment and denying Defendants’ Motion for Partial Summary Judgment because the legal precedent relied on to grant Plaintiff’s Motion for Partial Summary Judgment should be overturned. Therefore, the Order should be reversed and this case should be remanded to the trial court with instructions to uphold and enforce the Final Amendment.

**B. Relevant Course of Proceedings**

Ron filed a Complaint against the Darlene Patterson Family Protection Trust and the Estate of Darlene Patterson in this matter on October 25, 2007, seeking, among other things, a declaratory judgment that the Final Amendment to the Family Trust is void and should be disregarded in distributing the trust property. (R. at 7-11). Ron claimed the trust should be distributed giving no effect to the Final Amendment and he should take under the Family Trust even though Darlene expressly and explicitly intended to remove him as a beneficiary to the Family Trust via her Final Amendment. *Id.* An Amended Complaint was filed by Ron on May 3, 2008, which asked that specific findings of fact be made regarding, among other things, the propriety of the Final Amendment. (R. at 78). The Amended Complaint was answered by Randy on April 2, 2008, and by other Defendants on August 14, 2008. (R. at 155-61; 230-28).

Ron then filed a Motion for Partial Summary Judgment and Memorandum in Support on April 6, 2009, seeking summary judgment on his first cause of action; a declaratory judgment that the Final Amendment is void and that Ron is entitled to receive property



according to the Restatement of the Family Trust executed March 12, 2001. (R. at 323-97). On May 5, 2009, Randy, as trustee of the Family Trust, submitted a Memorandum in Opposition to Motion for Partial Summary Judgment (R. at 422-36), along with a Defendants' Counter Motion for Partial Summary Judgment and Memorandum in Support (R. at 418-19, 398-411). Randy sought a summary judgment declaring the Final Amendment valid and that it controls the disposition of the trust estate. *Id.* The parties then stipulated that the respective motions for partial summary judgment shall be submitted and considered without respect to the parties' disputes of fact over the issue of "undue influence." (R. at 420-21).

Complete briefing was had on the respective motions for partial summary judgment, and the same were submitted for decision on July 29, 2009 (R. at 513-16). The Court held a hearing on the motions on September 30, 2009 (R. at 615), and took the matters under advisement.

### **C. Disposition by the Court Below**

The trial court, in its November 30, 2009 Ruling (R. at 622-29, attached hereto as Addendum, Exhibit C) and December 21, 2009 Order (633-34, attached hereto as Addendum, Exhibit B), decided the respective motions for partial summary judgment as to the validity of the Final Amendment. The Ruling and Order granted Plaintiff's Motion for Partial Summary Judgment and denied Defendants' Counter Motion for Partial Summary Judgment. *Id.* In sum, the Ruling and Order determined that, as a matter of law, the Final Amendment was void in that it attempted to completely divest Ron of his interest in the

trust's property without completely revoking the Family Trust. The trial court determined that such revocation was necessary to completely divest one of the trust's beneficiaries because the Family Trust contains the language: "the interests of beneficiaries are presently vested interests subject to divestment which shall continue until this Trust is revoked or terminated other than by death". (R. at 625-28). The trial court placed much emphasis on the fact that the Final Amendment caused a "complete" divestment of Ron's beneficial interest; intimating that if Darlene would have left him something, even one penny, the Final Amendment would have been validated by the trial court and the trial court would have instructed the trust estate to be distributed according to the terms of the Final Amendment. *Id.*

**D. Statement of Undisputed Facts**

1. On or about October 25, 2007, Ron initiated this action, which pertains primarily to the parties' dispute over the distribution of trust property and the validity of trust amendments and restatements executed by the trustor, Darlene Patterson, prior to her death. (R. at 1-10).

2. On or about July 30, 1999, Darlene Patterson created The Darlene Patterson Family Protection Trust (the "Family Trust"). *See* Exhibit A of Complaint (R. at 13-36, attached hereto as Addendum, Exhibit F). The initial co-trustees of the Family Trust were Darlene Patterson and her husband, Rex E. Patterson. *Id.* at Art. VII § 7.6 (R. at 29, attached hereto as Addendum, Exhibit F).

3. The stated purpose of the Family Trust is “for the primary benefit of the Undersigned [Darlene Patterson] during the Undersigned’s [Darlene Patterson’s] lifetime, [and] for the Undersigned’s family thereafter.” *Id.* Art I § 1.1 (R. at 13). Darlene Patterson was the only beneficiary of the Family Trust entitled to use the trust estate during her lifetime. *See id. generally*, (R. at 338-61).

4. The Family Trust provides: “As long as the Undersigned is alive, the Undersigned reserves the right to amend, modify or revoke this Trust in whole or in part, including the principal, and the present or past undisbursed income from such principal. Such revocation or amendment of this Trust may be in whole or in part by written instrument.” *Id.* at Art. III, § 3.1 (emphasis added), (R. at 15).

5. The Family Trust provides “[t]he interests of the beneficiaries are presently vested interests subject to divestment which shall continue until this Trust is revoked or terminated other than by death.” *Id.* at Art. III, § 3.2 (emphasis added) (R. at 15).

6. The Family Trust lists Plaintiff Ron Patterson among the trust’s beneficiaries subject to divestment. *Id.* at Art. I § 1.1-1.2, (R. at 13).

7. On May 31, 2000, Darlene Patterson executed an amendment to the Family Trust (the “First Amendment”), which provided Plaintiff Ron Patterson additional property upon the distribution of the trust’s property. *See* Exhibit B of Complaint, ¶1 (R. at 38-39, attached hereto as Addendum, Exhibit G).

8. On or about March 12, 2001, Darlene executed a restatement of the Family Trust (the “Trust Restatement”); which, among other things, provided Plaintiff Ron Patterson with an

additional specific devise and reduced the contingent beneficial interests of Defendants Gary E. Patterson, Judy Ann Henry, and Rex A. Patterson. *See* Exhibit C of Complaint, Art. IX (R. at 41-56, attached hereto as Addendum, Exhibit H).

9. The terms of the Trust Restatement provided, in part, that its purpose was to “amend and restate in full the [Family Trust].” *Id.*, (R. at 41).

10. The Trust Restatement, in Article IX.B.5, left a specific distribution to Ron as follows:

The home and five (5) acres of real estate shall be distributed to Ronald S. Patterson, my son. The five (5) acres is a portion of the property located in Davis County currently identified as Serial No. 14-040-0067. Such portion shall be five (5) acres only (from this 14.34 acre parcel) and shall be the approximately five (5) acres located in closest proximity to the North side of the current home of Ronald S. Patterson. If Ronald S. Patterson has predeceased me then this property shall be divided among the descendants of Ronald S. Patterson by right of representation. Distribution of this share shall be subject to the restrictions provided in paragraphs C1 and C2 below. This distribution is in addition to the share of the Trust Estate to be distributed in paragraph C below.

*See id.*, (R. at 52).

11. Article IX.C. of the Trust Restatement also devised one-third of the “remainder of the Trust Estate” to Ron. *See id.*, (R. at 53).

12. During the time when Ron was living with Darlene Patterson, Ron unlawfully used Darlene’s credit card without authorization to make personal purchases including four-wheelers for his business. *See* Supplemental and Corrected Affidavit of Randy Patterson at ¶4, (R. at 474, attached hereto as Addendum, Exhibit E). Ron made many of these purchases online through Ebay and PayPal. *Id.* When Darlene discovered that these transactions had

taken place, she objected and notified PayPal that Ron had no authority to use her credit card.

*Id.*

13. In or about February of 2006, Darlene Patterson received a check from the State of California in the amount of \$52,936.53 payable to Darlene for a project involving real property which Darlene owned in California. *Id.* at ¶5. Ron, however, stole the check, forged Darlene's signature, cashed the check, and used the check funds for his personal benefit without Darlene's knowledge or permission. *Id.* Eventually, Ron's conduct was discovered, and Ron was convicted of the felony crimes of "Elder Abuse" and "Exploitation of an Elder." *Id.* In connection with his conviction, Ron was ordered to pay restitution in the amount of \$52,936.53, and was sentenced to jail and probation. *Id.*; *see also* court case dockets evidencing Ron's criminal actions against Darlene Patterson, attached hereto as Addendum, Exhibit D).

14. After Darlene discovered Ron's wrongdoings identified in paragraphs 13-14 above, she asked Mr. Carver, her attorney at the time, to prepare another Amendment to the Darlene Patterson Family Protection Trust. (R. at 474 ¶6).

15. On or about May 30, 2006, Darlene Patterson executed another amendment to the Family Trust (the "Final Amendment"), which was intended to effectively remove Ron as a beneficiary of the trust, by stating as follows:

I have intentionally not provided anything for my son Ronald S. Patterson (or his descendants) since I have already properly provided for this son during his lifetime as I felt was appropriate.

*See* Exhibit D of Complaint, at ¶C, (R. at 58-61, attached hereto as Addendum, Exhibit I).

16. Eleven months later, On April 30, 2007, and after executing the Final Amendment, Darlene passed away. *See* Affidavit of Randy Patterson dated April 30, 2009, at ¶12, (R. at 414).

17. On or about April 6, 2009, Ron filed his Motion for Partial Summary Judgment to invalidate the Final Amendment. (R. at 323-25).

18. On or about May 5, 2009, Defendants filed a Counter Motion for Partial Summary Judgment seeking a ruling that the Final Amendment was valid. (R. at 418-19).

19. On or about November 30, 2009, Judge Allphin entered the Ruling which granted Plaintiff's Motion for Partial Summary Judgment and denied the Defendant's Counter Motion for Partial Summary Judgment regarding the issue of the validity of the Final Amendment, and deeming it void due to the *Banks*' rationale. (R. at 622-29, attached hereto as Addendum Exhibit C).

20. The Order from which this appeal is taken was entered on December 21, 2009. (R. at 633-34, attached hereto as Addendum Exhibit B).

### **SUMMARY OF ARGUMENT**

The issue before this court is whether the trial court appropriately exalted form over substance in voiding the Final Amendment to benefit Ron Patterson, who was expressly and intentionally removed as a trust beneficiary via the Final Amendment by his elderly mother Darlene, acting as settlor, after it was discovered that Ron was exploiting and taking advantage of her (which acts resulted in his felony conviction). The trial court erred in voiding the Final Amendment because the substantive law relied upon in making said

determination (*Banks v. Means*) has been significantly limited and now should be overturned, and because the Utah Legislature has effectively overruled *Banks* by requiring only substantial compliance to amend a revocable trust, giving elevated weight to the settlor's intent. Therefore, the trust estate should be distributed according to the Final Amendment which evidences Darlene's substantial compliance with the trust's terms and her clear and undisputed intent.

*Banks v. Means* stands for the proposition that if a revocable trust contains language giving beneficiaries a "present interest" or "vested interest subject to divestment" and that such interests shall "continue until [the] Trust is revoked or terminated other than by death", that the settlor can only divest a beneficiary's interest by complete revocation of the trust and not by amendment or partial revocation, even when the settlor reserves powers to amend or revoke the trust in whole or in part. Since rendering this decision, this Court has had opportunity to reevaluate the position taken in *Banks* and has taken steps to ameliorate the potential inequities and harshness that could result from that decision. In *Flake*, a substantially similar revocable trust was at issue. This Court determined that there is no requirement of complete revocation where the beneficial interest is simply modified or amended, but not terminated. Therefore, *Flake* stands for the proposition that had the Final Amendment merely reduced Ron's beneficial share in the trust estate to one penny, rather than completely divesting his beneficial share, the Final Amendment would be valid. Such a result is inequitable and unjust. Further, in the *Hoggan* decision, this Court questioned the

purpose and effect of the “vesting” language. The time has come to overturn the *Banks* decision.

The Utah Legislature has taken further action to mitigate the *Banks* decision. In 2004 Utah Code Ann. § 75-7-605 was enacted. Said section governs the revocation or amendment of revocable trusts and states that a settlor may revoke or amend a revocable trust by substantially complying with a method provided in a trust, and if a method for amendment is not expressly made exclusive, a revocable trust can be amended by a settlor by any method manifesting clear and convincing evidence of the settlor’s intent. By amending and partially revoking the trust to divest Ron’s interest in the trust estate Darlene substantially, if not wholly, complied with the terms of the trust governing amendment and partial revocation. Further, the method of revocation and amendment provided in the trust is not made exclusive, therefore any method manifesting Darlene’s clear and convincing intent will suffice. The Final Amendment provides as follows: “I have intentionally not provided anything for my son Ronald S. Patterson (or his descendants) since I have already properly provided for this son during his lifetime as I felt was appropriate.” Darlene’s intent could not be clearer. She did not want Ron to have a beneficial interest in the trust estate.

Therefore, because *Banks* should be expressly overturned by this Court, and because Darlene’s Final Amendment complied with Utah trust law, the Final Amendment is valid and controlling. The trust estate should be distributed according to the Final Amendment.



## ARGUMENT

### **I. THE SUBSTANTIVE CASE LAW UPON WHICH THE TRIAL COURT RELIED IN GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT SHOULD BE OVERTURNED**

This appeal, in large part, is dependent upon this Court's interpretation and review of the case of *Banks v. Means*, as it applies to the Family Trust. Appellant asks this Court to overturn *Banks v. Means* as being contrary to accepted principles of law and justice, and contrary to the public interest. Particularly in view of the facts of this case, the *Banks v. Means* ruling allows Ron to perpetuate a serious wrong. Also determinative to the issue raised are *Banks'* progeny *Flake v. Flake*, 2003 UT 17, 71 P.3d 589 and *Hoggan v. Hoggan*, 2007 UT 78, 169 P.3d 750. All of these cases deal with trust language similar to that contained in the Family Trust; all of which deal with the trustor attempting to modify the terms of a trust. However, the following rule must be kept in mind before and while reviewing *Banks* and its progeny: "In interpreting the terms of the trust, the inquiry is as to the intent of the trustor." *Leggroan v. Zion's Sav. Bank & Trust Co.*, 232 P.2d 746, 749 (1951) (emphasis added).

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c); *Gerbich v. Numed, Inc.*, 1999 UT 37 at ¶10. As shown above in the Statement of Facts, the material facts in this case are undisputed. Therefore, this appeal seeks a ruling that Ron is not entitled to summary judgment as a matter of law, and that the oft-questioned law relied upon by the trial court (i.e., *Banks v. Means*) is no longer good law.

A. Analysis of *Banks v. Means*, *Flake v. Flake*, and *Hoggan v. Hoggan*, and Utah Statutory Trust Law

In *Banks*, the Utah Supreme Court had to determine whether a trustor was entitled to amend her revocable living trust agreement to change the remainder beneficiaries. *See generally, Banks v. Means*, 2002 UT 65, 52 P.3d 1190 (attached hereto as Addendum, Exhibit A). The trustor created a “family protection trust,” transferred certain property into the trust, and served as trustee until her death. *Id.* at ¶2. The Banks trust originally provided that upon the death of the grantor, her three children were to share equally in the proceeds of the trust estate. *Id.* at ¶3.

Approximately seven years after the Banks trust was originally executed, the grantor executed an amendment to the trust. *Id.* at ¶5. The amendment changed the trust beneficiaries, and allocated the entire trust estate to the grantor’s older sister, with the grantor’s children being listed as alternate beneficiaries should the older sister predecease the grantor. *Id.* After the death of the grantor, the beneficiaries disputed whether the 1999 amendment, or the original trust agreement, governed the disposition of the trust estate. *Id.* at ¶6.

The issue before the court was whether the trustor had the power under the trust agreement to amend the trust and divest the beneficiaries’ interest. *Id.* at ¶6. The trust agreement provided that as long as the grantor was alive, she “reserves the right to amend, modify, or revoke this Trust in whole or in part”. *Id.* at ¶4. It continued, “Such revocation or amendment of this Trust may be in whole or in part by written instrument.” *Id.* The Banks trust also contained the following language: “*The interests of the beneficiaries are presently*

*vested interests subject to divestment which shall continue until this Trust is revoked or terminated other than by death.” Id. (emphasis added).*

The Supreme Court ruled that the italicized language above authorized the trustor to divest the beneficiary’s interest only if the trustor revoked the trust in its entirety. *Id.* at ¶12. Therefore, the Supreme Court gave no meaning to the express terms of the trust allowing for partial revocations and partial amendments. *Id.* Although the trustor in *Banks* expressly reserved the right “to amend, modify or revoke this Trust, in whole or in part” the Court ruled and read into the trust language a requirement that an amendment or partial revocation could not divest a beneficiary’s interest. *Id.* at ¶14. Because the 1999 amendment to the Banks trust did not amount to a complete revocation, the purported amendment was held to be void and the Court held that the disposition of the trust estate was governed by the original trust agreement – not the 1999 amendment. *Id.* at ¶¶15-17.

Since the *Banks* decision was reported, courts (including this Court), scholars, and professionals have struggled to explain and apply its reasoning and logic, and Utah statutory law has virtually overturned it legislatively. This struggle to explain the *Banks* decision and attempts to mitigate the *Banks* decision’s wide-reaching and harsh effects is first evidenced in the Utah Supreme Court’s 2003 *Flake* decision. In *Flake*, the Supreme Court was confronted with trust language and circumstances substantially similar to that of *Banks*. See generally, *Flake*, 2003 UT 17, 71 P.3d 589 (attached hereto as Addendum, Exhibit A). However, in the *Flake* decision the court ruled that where the amendment reduced, but did not completely eliminate, the challenging beneficiary’s interest, the amendment would be

valid, even if the trust was not completely revoked prior to the amendment. *Id.*

In *Banks*, the trustor's sister who was named beneficiary under the voided amendment unsuccessfully argued that the provision in the trust instrument specifying that vested interests were created in the children was intended to establish that the trust was not illusory, not to restrict the settlor's ability to divest the children's interests. *Banks*, 2002 UT 65 at ¶13. In *Flake*, less than two years after the *Banks* decision, the Supreme Court was distinguishing its *Banks* decision and analysis, and recognized that the purpose of the "vesting" language in the trust was to insure that the revocable living trust was not deemed to be an illusory trust. *Flake*, 2003 UT 17 at ¶17. The *Flake* analysis attempted to reduce the harshness and inequitable nature of *Banks* without expressly overruling it, and was successful in significantly limiting the *Banks* effect. In short, *Flake* permitted an amendment partially divesting a beneficiary's interest in a trust containing the same or substantially similar language to that in the *Banks* trust.

Thus, from the *Flake* case, it is clear that the purpose of the language was not to protect the beneficiary's interest from being deleted by an amendment, as seems to be the perception in *Banks*, but rather to insure that the revocable living trust was not deemed illusory.

In the most recent of the *Banks*' progeny, *Hoggan v. Hoggan*, 2007 UT 78, 169 P.3d 750 (attached hereto as Addendum, Exhibit A), the Supreme Court of Utah, once again, questioned the *Banks* decision. In *Hoggan*, the trustor created a trust in 1987. *Id.* at ¶2. Under the terms of the trust, the trust property was to be used for the trustor's benefit during

her lifetime, and was to be distributed equally among her three children upon her death. *Id.* The trustor expressly reserved the right to amend, modify, or revoke the trust, and the trust contained a clause that stated as follows: “The interest of the beneficiaries is a present interest which shall continue until this Trust is revoked or terminated other than by death.” *Id.* In 2002, the trustor executed an amendment to the trust modifying the allocation of trust property upon her death. *Id.* at ¶3. She passed away two months after executing the amendment, and a beneficiary sought to invalidate the 2002 amendment. *Id.* at ¶4. The Supreme Court of Utah held that because the 2002 amendment merely modified the beneficiary’s interest in the trust, the amendment is valid. *Id.* at ¶16.

However, in the *Hoggan* analysis, the Utah Supreme Court reviewed the reasoning behind the *Banks* decision. In doing so, the Court recognized the purpose of the language asserting that beneficiaries have a “present interest” or a “presently vested interest” in a trust was to ward off potential challenges to the trust on grounds that it is illusory. *Id.* at FN2. The purpose of such language had nothing to do with protecting the beneficiary’s interest from being deleted by an amendment (this is contrary to the impetus behind the original *Banks* analysis). *Id.* The Court recognized that the use of this phrase has the potential to produce results not within the contemplation of the drafter of trusts or their clients and language proclaiming beneficiaries have a “present interest” contradicts the operative terms of the trust. *Id.* The Utah Supreme Court held that the term “present interest” or “vested interest subject to divestment” is “more of an oxymoron than a meaningful legal term” and expressly “disavowed” the use of the phrase in its entirety and the logic behind its use in trust

documents. *Id.* However, the court did not expressly overrule *Banks*.

In its analysis, the Court relied heavily on the Restatement (Third) of Trusts, which “advocates the abandonment of such confusing and disingenuous terminology in favor of an open recognition that there is no requirement that a beneficiary’s interest be either present or vested.” *Id.* (citing Restatement (Third) of Trusts § 25 reporter’s notes, cmt. B (2003)). Statements, such as the one at issue in this case, confuse the issue and the reader, and ignore the reality that courts regularly and properly find valid trusts where settlors have retained complete control, and where the other beneficiaries have only future interests that are not only defeasible by revocation or amendment, but also contingent upon surviving the settlor in addition to other events. *Id.*

Finally, the Utah legislature has effectively overruled *Banks*’ strict interpretation of trust law by adopting the Uniform Trust Code’s position on the revocation and amendment of revocable trusts. Utah Code Annotated section 75-7-605 governs the revocation and amendment of revocable trusts and states, in relevant part, as follows:

- (3) The settlor may revoke or amend a revocable trust:
  - (a) by substantially complying with a method provided in the terms of the trust; or
  - (b) if the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by:
    - (i) executing a later will or codicil that expressly refers to the trust or specifically devises property that would otherwise have passed according to the terms of the trust; or
    - (ii) any other method manifesting clear and convincing evidence of the settlor's intent.
- (4) Upon revocation of a revocable trust, the trustee shall deliver the trust property as the settlor directs.

Utah Code Ann. § 75-7-605(3)-(4) (2009) (note, this law was enacted by Chapter 89, in the 2004 General Session, after the *Banks* decision and before the Final Amendment was executed by Darlene).

Therefore, under current trust law, a revocable trust may be revoked or amended by “any ... method manifesting clear and convincing evidence of the settlor’s intent,” unless the terms of the trust not only specify a method, but also expressly make it exclusive. *Id.* Further, even if the trust terms expressly provide an exclusive method of revocation or amendment, substantial compliance (rather than strict compliance as required in *Banks*) will be sufficient. *Id.*

B. Scholarly authorities agree that *Banks v. Means* should be expressly overruled because this court has substantially limited its effect and questioned its analysis in subsequent case law and Utah has taken legislative steps that effectively overrule the decision

In a 2004 Utah Bar Journal article entitled “Can you Amend that Revocable Trust? Utah Estate Planning Lawyers Face a Trap for the Unwary”, Charles M. Bennett, a Fellow in the American College of Trust & Estate Counsel, a past chair of the Utah Estate Planning Section, and an adjunct professor of law at the University of Utah, further questioned the propriety of the *Banks* decision by declaring:

The *Banks* analysis is thus revealed to be seriously flawed. It is illogical to believe that a trustor reserves the power “to amend, modify or revoke” only to restrict the right to amend, but not the right to revoke. Such a reading truly exalts form over substance. Under general contract law, “an interpretation that will produce an inequitable result will be adopted only where the contract so expressly and unequivocally so provides that there is no other reasonable interpretation to be given it.” *Pierce v. Pierce*, ¶19, 994 P.2d 193, 386 Utah Adv. Rep. 38, 2000 UT 7 (citations omitted). Far from requiring an unreasonable interpretation, the *Banks* trust language supports the opposite conclusion. The trustor in *Banks* did not retain just the power “to amend,

modify or revoke.” Instead, she retained the right “to amend, modify or revoke this Trust in whole or in part.” Indeed, the trust document reiterated that the revocation could be in whole or in part in the very next sentence: “Such revocation or amendment of this Trust may be in whole or in part by written instrument.” The Court should have recognized that an amendment that deletes one beneficiary and adds another is a revocation of the Trust “in part” as to the deleted beneficiary’s rights in the trust.

Charles M. Bennett, *Can you Amend that Revocable Trust?* *Utah Estate Planning Lawyers Face a Trap for the Unwary*, 2004 Utah Bar Journal, available at [http://webster.utahbar.org/barjournal/2004/08/can\\_you\\_amend\\_that\\_revocable\\_t.html#more](http://webster.utahbar.org/barjournal/2004/08/can_you_amend_that_revocable_t.html#more) (attached hereto as Addendum, Exhibit J).

Mr. Bennett is not alone in his disagreement with the rationale and propriety of the *Banks* decision. Since the *Banks* decision, Utah courts have been scrambling to find ways to mitigate the decision’s harsh effects and explain its rationale (as illustrated above in Part A). The court itself has taken proactive measures to substantially minimize the adverse effect of *Banks* (see *Flake* and *Hoggan*, Addendum, Exhibit A), and the Utah Legislature has also taken action to address *Banks* by replacing *Banks*’ strict compliance rationale with an intention of the settlor rationale.

Decisions such as *Banks*, while arguably at one time supported by traditional trust law doctrines, not only are “intention defeating”, but also “exalt form over substance” in ignoring the practical reality that settlors of revocable trusts commonly use them as will substitutes and consider the trust assets as their own, without limitation. See Alan Newman, *Revocable Trusts and the Law of Wills: An Imperfect Fit*, at pp. 11-12, available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1009&context=alan\\_newman](http://works.bepress.com/cgi/viewcontent.cgi?article=1009&context=alan_newman) (relevant



section attached hereto as Addendum, Exhibit K). For this reason, the Uniform Trust Code, which Utah codified, relaxes considerably the rules followed by some jurisdictions in cases such as *Banks*, under which, if the terms of the trust prescribe a method for revoking or amending it, the settlor may do so only by employing the method so specified. *Id.*; *see also* Utah Code Ann. § 75-7-605(3)-(4) (2009). Rather than requiring the strict, “intention-defeating” compliance with the trust language the Court specified in *Banks*, the Utah Uniform Trust Code’s trust revocation and amendment rules are “intent furthering.” *Id.*

Based on the foregoing, Ron’s argument is flawed. Ron would have this court believe that Darlene Patterson intentionally reserved the power to amend, modify, or revoke her trust in one part of the trust instrument, only to restrict the right to amend, but not the right to revoke, in a latter part of the same instrument. (R. at 331-33). Such a reading of the Family Trust truly exalts the form of the trust instrument over its substance. Instead, this court should recognize that Darlene intended to reserve the right to disinherit or not provide for any beneficiary not only by way of a revocation, but also by way of an amendment. It should also be recognized that an amendment which eliminates the beneficial interest of one beneficiary (such as the Second Amendment in this case) constitutes a total revocation of the trust as to that beneficiary’s rights in the trust estate. Thus, the total revocation Ron insists upon has, in fact, taken place.

Further, the case analyses of *Banks*, *Flake*, and *Hoggan* above, evidence a desire by this court to “soften” *Banks* and distance itself from the harsh effects of its earlier decision. This worthy desire has, however, lead to the potential for extreme inequities that have been

revealed in the case at hand. Under the Court's rationale in *Banks*, *Flake*, and *Hoggan*, as argued by Ron, it would have been valid for Darlene to have effectively eliminated Ron's beneficial interest in the trust estate by signing an amendment which reduced that interest to no more than one penny. (R. at 333). Ron argued, however, that it was not valid for Darlene to sign an amendment which expressly reduced Ron's interest to nothing.

Therefore, because this court has taken steps through subsequent case law to reduce the potential inequities that could result from the *Banks* decision and acknowledged its "vested interest" analysis in *Banks* may have been flawed, and because Utah law now places an elevated interest on the clear intent of the settlor of the trust agreement, *Banks* should be finally and expressly overruled. For these reasons, Defendant's Counter Motion for Partial Summary Judgment should be granted.

## **II. THE ASSETS OF THE FAMILY TRUST SHOULD BE DISTRIBUTED IN ACCORDANCE WITH THE FINAL AMENDMENT**

The assets of the Family Trust should be distributed pursuant to the Final Amendment dated May 20, 2006. Ron suggests, by way of his Motion for Partial Summary Judgment, that this Final Amendment "violated the rules" of the Family Trust because it eliminated Ron's interest in the trust estate upon the death of Darlene Patterson. In support of his position, Ron relies primarily on the case of *Banks v. Means*, 52 P.3d 1190 (Utah 2002), and its progeny. However, as explained previously, Ron's argument is flawed. The facts and law of this case support the enforcement of the Final Amendment and Defendant's Counter Motion for Partial Summary Judgment.

A. Darlene Patterson effectively amended and/ or partially revoked the Family Trust, and its Trust Restatement, via the Final Amendment pursuant to the Utah Uniform Trust Code and the provisions of the Family Trust, and its Trust Restatement

Because Darlene substantially, if not completely, complied with the terms of the Family Trust (as amended by the Trust Restatement) when she amended and partially revoked provisions of the trust by means of the Final Amendment, and because the Final Amendment manifests the clear and convincing intent of Darlene, as settlor, to remove Ron's beneficial interest from the trust, the Family Trust was effectively modified and the trust estate should be governed by the terms of the Final Amendment.

As mentioned above, the Utah legislature, after the *Banks* decision, enacted trust laws relaxing the strict compliance and adherence to traditional trust law which was relied on in the *Banks* case. Rather than requiring strict compliance to a trust's language, Utah trust law now requires only substantial compliance with the trust's terms to modify, revoke, or amend revocable trust instruments. Utah Code Ann. § 75-7-605(3)-(4) (2009). Further, unless a revocable trust instrument "expressly made exclusive" a means of modifying, revoking, or amending a trust, any method will suffice that manifests "clear and convincing evidence of the settlor's intent." *Id.*

Darlene's execution of the Final Amendment substantially complied with the provisions of the Family Trust as restated by the Trust Restatement. The Trust Restatement provides, in relevant part, as follows:

I reserve the right to amend or revoke this Trust in whole or in part. Such amendment or revocation shall be by written instrument and shall be effective upon the signing thereof by me without notice to any successor Trustee.

See Trust Restatement, Art. II (R. at 42, attached hereto as Addendum, Exhibit H). The Trust Restatement also contains beneficiary interest language similar to that in the Family Trust and provides: “The interest of the beneficiaries is a present interest which shall continue until this Trust is revoked or terminated.” *Id.* at Art. V.B, (R. at 43).

The Trust Restatement provides that a beneficiary’s interest continues until the Trust is revoked or terminated. *Id.* Further, the revoking language states that a revocation can be “in whole or in part” so long as the revocation is done by written instrument. *Id.* Nothing in the Trust Restatement’s language requires the revocation to be a complete revocation to discontinue a beneficiary’s interest, and, unlike the trust in *Banks*, there is no specific language in the Trust Restatement stating a complete revocation requires the trust property to be returned to the settlor, thereby, distinguishing an amendment and a revocation.

By executing the Final Amendment on May 30, 2006, Darlene substantially, if not wholly, complied with the terms of the Trust Restatement to amend the trust and revoke Ron’s beneficial interest in the trust estate. It is respectfully submitted that an amendment that deletes one beneficiary (Ron) is a revocation of the trust “in part” as to the deleted beneficiary’s (Ron’s) rights in the trust. The Final Amendment and revocation of Ron’s rights in the trust was done by a written instrument and signed by Darlene, thereby, satisfying the only mandatory revocation requirement established by the trust. Therefore, Darlene substantially complied with the terms of the Trust Restatement, and effectively, pursuant to Utah trust law, removed Ron as a beneficiary by revoking the trust provision providing for Ron’s beneficial interest.

Further, there is no language in the Trust Restatement making any method of revocation or amendment of its provisions the exclusive method. Therefore, Utah Code Ann. § 75-7-605(3)(b)(ii) is relevant and provides: “The settlor may revoke or amend a revocable trust ... if ... the method provided in the terms is not expressly made exclusive, by ... any other method manifesting clear and convincing evidence of the settlor's intent.” This is consistent with longstanding common law trust interpretation policy that when interpreting the terms of a trust, the proper focus of inquiry is the settlor's intent. *See Leggroan v. Zion's Sav. Bank & Trust Co.*, 232 P.2d 746, 749 (1951). Therefore, pursuant to Utah trust law, because no means of revocation was made exclusive, Darlene could revoke Ron’s beneficial share in the trust estate by any method manifesting her clear and convincing intent.

**B. Darlene Patterson clearly intended not to provide for Ron under the Trust**

In this case, and for purposes of the parties’ respective motions for partial summary judgment, Darlene’s intent in executing the May 30, 2006 Final Amendment is undisputed. The Final Amendment, executed by Darlene after she had discovered that Ron was unlawfully using her credit card to make personal unauthorized purchases, and shortly after Darlene discovered that Ron had stolen a \$52,936.53 check from her, forged her signature, and illegally used the funds, makes the intent of Darlene, as settlor, explicit and incontrovertible by stating as follows:

I have intentionally not provided anything for my son Ronald S. Patterson (or his descendants) since I have already properly provided for this son during his lifetime as I felt was appropriate.

*See* Exhibit D of Complaint, at ¶C, (R. at 58-61, attached hereto as Addendum, Exhibit I) and

see Supplemental and Corrected Affidavit of Randy Patterson at ¶¶4-5, (R. at 474-84, attached hereto as Addendum, Exhibit E, and court docket, attached hereto as Addendum, Exhibit D). The intent of Darlene is clear that she wishes to remove Ron as a beneficiary of the Family Trust. Therefore, Darlene's partial revocation of Ron's interest in the trust estate by means of the Final Amendment was sufficient, because it clearly manifested her intent to not provide any part of the trust estate to Ron, and that she had already properly provided for Ron as she felt was appropriate. The trust estate should be distributed pursuant to the terms of the Final Amendment.

C. Darlene Patterson Clearly Intended that She be the Only Beneficiary With a Presently Vested Interest in the Trust Estate Prior to the Date of Her Death.

Again, when interpreting the terms of a trust, the proper focus of inquiry is always the grantor's intent. In the *Banks* case, on which Ron so heavily relies, the court seemingly ignored the practical intent and purpose of the trust at issue and, instead, placed great focus on the grantor's use of the phrase "vested interests" in determining the rights of the contingent future beneficiaries. That same mistake should not be made in the case at hand.

Rather, Utah should acknowledge and follow the increasing national trend to treat the interest of a remainder beneficiary in a revocable trust during the lifetime of the settlor as a mere expectancy. See, e.g., Restatement (Third) of Trusts § 25 cmt. A (2003). The settlor of a revocable trust who retains both the equitable life interest and the power to alter and revoke the beneficiary designation has used the trust form to achieve the effect of testation. Only nomenclature distinguishes the remainder interest created by such a trust from the mere expectancy arising under a will. Consistent with this position, under the Restatement (Third)

of Trusts, creditors of a remainder beneficiary of a revocable trust may not reach her interest in the trust during the settlor's lifetime and, therefore, should not be treated as a vested interest. *See* Restatement (Third) of Trusts § 56 cmt. B (2003); *see also* Alan Newman, *Revocable Trusts and the Law of Wills: An Imperfect Fit*, at p.7, FN44, available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1009&context=alan\\_newman](http://works.bepress.com/cgi/viewcontent.cgi?article=1009&context=alan_newman) (citing John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 Harv. L. Rev. 1108, 1113 (1984)) (relevant section attached hereto as Addendum, Exhibit K). Further, Utah Code Ann. § 75-7-606(1) (2009) provides “[w]hile a trust is revocable and the settlor has capacity to revoke the trust, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor” (emphasis added).

Regardless of the inclusion of the phrase “vested interests”, when the Family Trust is read as a whole, it is clear that only Darlene Patterson held a vested beneficial interest in the trust estate, and that she intended for her Children to have only a contingent beneficial interest in the trust estate. The Family Trust was established “for the primary benefit of [Darlene Patterson] during [her] lifetime,” and was designed to benefit her children only after her death. (R. at 13, attached hereto as Addendum, Exhibit F). During Darlene's lifetime, she was the only beneficiary of the Family Trust who was in any way entitled to the income or principal of the trust estate. (R. at 14).

By contrast, Darlene's Children (including Ron) had no right to use, access, or demand any portion of the trust estate during Darlene's lifetime. Accordingly, the interests of the Children were contingent and not vested. Based on the underlying structure of the

Family Trust, it is illogical for Ron to argue that Darlene intended for each of her Children to have a present interest in the trust property that was terminable only by way of a total revocation of the entire trust instrument. For all practical purposes, the Children had no such interest. Thus, Darlene could properly amend the Trust during her lifetime to eliminate or terminate a contingent beneficial interest previously provided in the Trust for Ron, and could do so without the necessity of a complete revocation or termination of the entire Trust Agreement. Only the trust or contingent beneficial interest for Ron needed to be terminated or revoked, as opposed to the termination or revocation of the entire Trust. This is precisely what Darlene did, and intended to do, by the Final Amendment.

D. It Would be Illogical and Inequitable for the Court to Interpret the Plain Language of the Family Trust as Creating a Presently Vested Beneficial Interest in Ron or His Siblings

If Ron insists on a literal interpretation of the Family Trust, then the phrase “vested interests”, as used in Paragraph 3.2 of the original trust agreement, can only apply to those individuals who had a present unconditional lifetime beneficial interest in the trust estate (i.e., only Darlene Patterson). In order for something to be “vested”, it must be an “absolute”, “unconditional”, “completed”, and “consummated right for present or future enjoyment”. BLACK’S LAW DICTIONARY 4837 (8th ed. 2004). That is, a vested interest cannot in any way be “conditional”. *Id.* In this case, Darlene Patterson was the only beneficiary of the Family Trust who had an absolute, unconditional, completed, and consummated right to use any portion (or all) of the Family Trust estate. No other trust beneficiary had such an interest. In fact, Ron’s rights to the trust property (and the rights of



the other beneficiary Children) only became absolute and unconditional upon Darlene's death, and then only to the extent provided in the terms of the trust as modified. Until that time, Darlene retained the absolute power to change the trust terms, to use all or any portion of the trust estate for any purpose which she deemed fit, and/or to revoke the trust in part or in its entirety. Darlene Patterson was under no obligation to continue the trust, or to otherwise protect and preserve the trust property for the benefit of any person other than herself. For Ron to claim that he had a vested absolute and unconditional interest in the trust estate during the life of his mother, despite the fact that he had no right to any of the trust property during that time, ignores the very definition of the term "vested," and defies logic.

Under the facts of this case, the only rational interpretation of Paragraph 3.2 is to construe it as applying only to the active primary trust beneficiaries. "The active beneficiaries of a trust, as distinct from the contingent beneficiaries, are the individuals for whose benefit and support the property is presently being managed." *In re Estate of West*, 948 P.2d 351, 355 (Utah 1997). In other words, logic would suggest that the "beneficiaries" being referred to in Paragraph 3.2 as having a "presently vested interest" are only those beneficiaries who are presently (i.e., at the time in question) entitled to the trust property and do, in fact, have an absolute and unconditional interest therein. In this case, the only such beneficiary at the time of the creation of the Family Trust was Darlene Patterson. Interpreting Paragraph 3.2 along those lines makes practical sense given the obvious fact that the future contingent beneficiaries of the Family Trust (i.e., the Children) had no presently actionable rights with regard to any trust property during the grantor's lifetime. (*See*

Uniform Trust Code § 603(a) (endorses the general rule that during the settlor's lifetime, the remainder beneficiaries, i.e., the children, may not enforce the trust).

This interpretation also coincides with the rulings of courts from other jurisdictions. In California, for example, it has been held that “[s]o long as a trust is revocable, a beneficiary's rights are merely potential, rather than vested [and] [t]he beneficiary's interest could evaporate in a moment at the whim of the trustor . . .”. *Johnson v. Kotyck*, 76 Cal. App. 4th 83, 88 (Cal. App. 2<sup>nd</sup> Dist. 1999). “Giving a beneficiary with a contingent, nonvested interest all the rights of a vested beneficiary is untenable[,] [w]e cannot confer on the contingent beneficiary rights that are illusory, which the beneficiary only *hopes* to have upon the death of the trustor.” *Id.* During Darlene Patterson's lifetime, the beneficial rights of Ron in the trust estate were potential, illusory, non-vested rights – nothing more.

Furthermore, under these circumstances, it would be wholly inequitable for the court to award Ron an interest in the trust estate other than that which was left to him under the Final Amendment. Under general contract law, “an interpretation that will produce an inequitable result will be adopted only where the contract so expressly and unequivocally so provides that there is no other reasonable interpretation to be given it”. *Peirce v. Peirce*, 2000 UT 7, ¶19, 994 P.2d 193. Because a trust is fundamentally a contractual relationship between one or more individuals, these same principles would apply and should further dilute Ron's claims.

Under the facts of this case, equity demands an interpretation of Paragraph 3.2 consistent with the foregoing portions of this Memorandum. During the time when Ron was

living with his elderly mother, Ron secretly used his mother's credit cards to purchase four-wheelers for his business without any permission to do so. Ron made these purchases through the internet and, when discovered, made no attempt to repay the amounts that he had stolen. During approximately February of 2006, Ron stole a \$52,936.53 check from his mother, forged his mother's signature, cashed the check, and used the funds for his own personal benefit without his mother's knowledge or consent. After this wrongdoing was discovered, Ron was convicted of the crimes of "Elder Abuse" and "Exploitation of an Elder", and was sentenced to forty five days in the county jail.

Darlene Patterson, after discovering the criminal conduct of Ron, then prepared and executed the Final Amendment. Ron now has the temerity to ask this court to disregard his prior conduct, ignore the changes his mother rightfully made to the Family Trust by way of the Final Amendment, and interpret the trust language in a manner that favors his own selfish financial interests to the detriment of others. Under these facts, Ron's interpretation of the Family Trust (Paragraph 3.2 in particular) would produce a completely inequitable and unconscionable result in the distribution of his deceased mother's estate. This court should not sanction such misconduct by giving credibility to Ron's argument, and awarding him funds to which he has no lawful or equitable entitlement.

- E. The facts of this case distinguish it from the *Banks*' case and the *Banks*' case should not be determinative of the distribution of the Trust Estate, rather, this court should order the distribution in accordance with the Final Amendment

Even if *Banks* is upheld by this court as good law, there are many factors distinguishing the case at issue from the facts of *Banks*. A notable factor which the *Banks*'

court relied upon in coming to this determination was that the Banks' trust had a separate provision indicating that in the case of complete revocation, "the Trustee shall deliver to the Undersigned, as the Undersigned may direct in the instrument of revocation, all of the Trust property". *Banks v. Means*, 2002 UT 65 at ¶¶ 4, 10. The court reasoned that this language, being a specific provision of the trust, distinguished a "revocation" from an "amendment or modification" and established that a revocation is not the same as an amendment or modification in this trust. *Id.* at ¶11. Also noted by the court was "what the 1999 amendment did not do". *Id.* at FN5. Footnote 5 points out the amendment did not change the purpose of the trust that Ms. Banks be provided for during her life and for the benefit of her family after and did not change specific identifications by name and birthdate of the children as her family. *Id.* Additionally, the court stated, accepting the 1999 amendment would render some trust language null and void, and would contravene the stated purpose. *Id.*

However, unlike the Banks' trust, the Family Trust of Darlene Patterson, as restated by the Trust Restatement, contains no language governing complete revocation. In fact, nowhere in the Trust Restatement is complete revocation required, explained, or mentioned. Rather, the Trust Restatement explicitly provides revocation can be made in whole or in part and only requires that such be done in writing and signed by the settlor. Therefore, unlike *Banks*, there is no distinguishing language in the Trust Restatement that would lead a party or the court to believe that a complete revocation is necessary to divest a beneficiary of his or her rights in the trust.

Further, the *Banks*' court placed emphasis on the fact the purpose of the trust would be

nullified if it accepted the 1999 amendment. However, in this case, the Patterson Final Amendment completely restated the beneficiaries of the trust and does not require any of the Trust Restatement's language to be rendered null and void. The purposes of the trust are still fulfilled, and all of its provisions can be followed, even after giving effect to the Final Amendment.

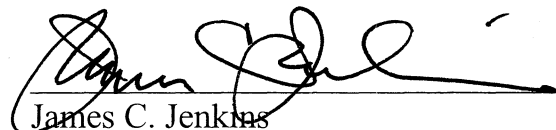
Therefore, the Final Amendment should govern the disposition of the trust estate.

### CONCLUSION

In light of the foregoing, the Order Granting Plaintiff's Motion for Partial Summary Judgment and Denying Defendants' Counter Motion for Partial Summary Judgment should be reversed and this case should be remanded to the trial court with instructions to uphold and enforce the Final Amendment.

DATED this 30<sup>th</sup> day of April, 2010

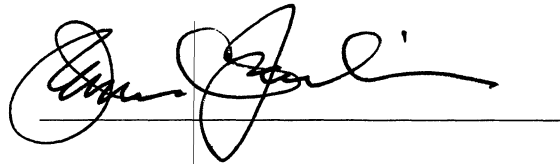
OLSON & HOGGAN, P.C.

A handwritten signature in black ink, appearing to read "James C. Jenkins", is written over a horizontal line.

James C. Jenkins  
Attorney for Plaintiff, Petitioner, and  
Appellant

## CERTIFICATE OF DELIVERY

I hereby certify that on this 30<sup>th</sup> day of April, 2010, I caused to be delivered one original and nine copies of the foregoing **BRIEF OF APPELLANT**, to the Supreme Court of Utah, and mailed, postage prepaid, two true and correct copies of the foregoing **BRIEF OF APPELLANT**, to L. Miles LeBaron, Tyler J. Jensen, and Jacob D. Briggs, LeBaron & Jensen, P.C., 476 West Heritage Park Blvd., Suite 200, Layton, Utah 84041, and Craig T. Peterson of Cathcart & Peterson, LLC, at 80 North Main Street, Bountiful, Utah 84010.

A handwritten signature in black ink, written over a horizontal line. The signature is stylized and appears to be "Craig T. Peterson".

Tab A

## **EXHIBIT A**

### **DETERMINATIVE PROVISIONS OF LAW**

The following are the constitutional provisions, statutes, ordinances, rules, or regulations determinative or of central importance to this appeal.

1. Utah Code Ann. § 75-7-605 (2009)
2. Utah Code Ann. § 75-7-606 (2009)
3. *Banks v. Means*, 2002 UT 65, 52 P.3d 1190
4. *Flake v. Flake*, 2003 UT 17, 71 P.3d 589
5. *Hoggan v. Hoggan*, 2007 UT 78, 169 P.3d 750

The aforementioned citations are set forth verbatim in this Exhibit A.



Tab 1



UTAH CODE ANNOTATED

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\*\*\* STATUTES CURRENT THROUGH THE 2009 FIRST SPECIAL SESSION. \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH 2009 UT 77 (12/4/2009); 2009 UT App 357  
(12/3/2009) AND DECEMBER 1, 2009 (FEDERAL CASES). \*\*\*

TITLE 75. UTAH UNIFORM PROBATE CODE  
CHAPTER 7. UTAH UNIFORM TRUST CODE  
PART 6. REVOCABLE TRUSTS

**Go to the Utah Code Archive Directory**

*Utah Code Ann. § 75-7-605 (2010)*

§ 75-7-605. Revocation or amendment of revocable trust

(1) Unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust. This Subsection (1) does not apply to a trust created under an instrument executed before May 1, 2004.

(2) If a revocable trust is created or funded by more than one settlor:

(a) to the extent the trust consists of community property, the trust may be revoked by either spouse acting alone but may be amended only by joint action of both spouses; and

(b) to the extent the trust consists of property other than community property, each settlor may revoke or amend the trust with regard to the portion of the trust property attributable to that settlor's contribution.

(3) The settlor may revoke or amend a revocable trust:

(a) by substantially complying with a method provided in the terms of the trust; or

(b) if the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by:

(i) executing a later will or codicil that expressly refers to the trust or specifically devises property that would otherwise have passed according to the terms of the trust; or

(ii) any other method manifesting clear and convincing evidence of the settlor's intent.

(4) Upon revocation of a revocable trust, the trustee shall deliver the trust property as the settlor directs.

(5) A settlor's powers with respect to revocation, amendment, or distribution of trust property may be exercised by an agent under a power of attorney only to the extent expressly authorized by the terms of the trust or the power.

(6) A conservator of the settlor or, if no conservator has been appointed, a guardian of the settlor may exercise a settlor's powers with respect to revocation, amendment, or distribution of trust property only with the approval of the court supervising the conservatorship or guardianship.

(7) A trustee who does not know that a trust has been revoked or amended is not liable to the settlor or settlor's successors in interest for distributions made and other actions taken on the assumption that the trust had not been amended or revoked.

**HISTORY:** C. 1953, 75-7-605, enacted by L. 2004, ch. 89, § 70.

**NOTES:** EFFECTIVE DATES. --Laws 2004, ch. 89, § 123 makes the act effective on July 1, 2004.

#### **LexisNexis 50 State Surveys, Legislation & Regulations**

##### Trusts

#### NOTES TO DECISIONS

##### REVOCATION.

Quitclaim deed purporting to transfer trust property did not revoke the trust because it did not comply with the terms of the trust documents. *Davis v. Young*, 2008 UT App 246, 190 P.3d 23.

**USER NOTE:** For more generally applicable notes, see notes under the first section of this article, part, chapter, subtitle, or title.

Tab 2



UTAH CODE ANNOTATED

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\*\*\* STATUTES CURRENT THROUGH THE 2009 FIRST SPECIAL SESSION. \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH 2009 UT 77 (12/4/2009); 2009 UT App 357  
(12/3/2009) AND DECEMBER 1, 2009 (FEDERAL CASES). \*\*\*

TITLE 75. UTAH UNIFORM PROBATE CODE  
CHAPTER 7. UTAH UNIFORM TRUST CODE  
PART 6. REVOCABLE TRUSTS

**Go to the Utah Code Archive Directory**

*Utah Code Ann. § 75-7-606 (2010)*

§ 75-7-606. Settlor's powers -- Powers of withdrawal

(1) While a trust is revocable and the settlor has capacity to revoke the trust, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor.

(2) If a revocable trust has more than one settlor, the duties of the trustee are owed to all of the settlors having capacity to revoke the trust.

(3) During the period the power may be exercised, the holder of a power of withdrawal has the rights of a settlor of a revocable trust under this section to the extent of the property subject to the power.

**HISTORY:** C. 1953, 75-7-606, enacted by L. 2004, ch. 89, § 71.

**NOTES:** EFFECTIVE DATES. --Laws 2004, ch. 89, § 123 makes the act effective on July 1, 2004.

**LexisNexis 50 State Surveys, Legislation & Regulations**

Trusts

USER NOTE: For more generally applicable notes, see notes under the first section of this article, part, chapter, subtitle, or title.

Tab 3



Caution

As of: Apr 22, 2010

**Kenneth Alan Banks, Susan Banks Baker, and Bransford Michael Banks, and John Does 1 through 50, Plaintiffs, Counterclaim Defendants, and Appellees, v. Nancy A. Means and John Does I through V, Defendants, Counterclaim Plaintiffs, and Appellant.**

**No. 20001071**

**SUPREME COURT OF UTAH**

***2002 UT 65; 52 P.3d 1190; 452 Utah Adv. Rep. 10; 2002 Utah LEXIS 92***

**July 19, 2002, Filed**

**PRIOR HISTORY:** [\*\*\*1] Third District, Salt Lake. The Honorable Frank G. Noel.

**DISPOSITION:** District court's grant of summary judgment affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** The Third District Court, Salt Lake, Utah, granted summary judgment in favor of appellees, decedent's children, in their action against appellant, decedent's sister, seeking enforcement of a trust that was purportedly modified by a later amendment. The sister appealed.

**OVERVIEW:** The sister argued that the trial court erred by granting the children's motion for summary judgment, denying her cross-motion for summary judgment, and admitting the deposition testimony of the attorney. The appellate court found that it was clear from the

trust language that the sister reserved for herself the power to amend, modify, or revoke the trust in whole or in part. A complete revocation was required to divest the beneficiaries of their vested interests. The amendment provided that beneficiary interests were only subject to divestiture via a revocation of the trust, and property had to be delivered to the sister. These requirements were not met. The sister did not divest the children of their vested interests in the trust, as she did not completely revoke the trust in the amendment. The amendment did not effect a revocation of the trust that would have properly divested the children of their vested interests under the terms of the trust itself.

**OUTCOME:** The judgment was affirmed.

**CORE TERMS:** beneficiary, revocation, summary judgment, vested interests, revoke, amend, reserved, modify, settlor's, vested, divested, revoked, trust estate, successor trustees, divestiture, terminated, trust agreement, divest,

sole beneficiary, modification, predecease, decedent, trust instrument, trust property, revocable trust, power to revoke, specific provision, illusory, AMENDMENT REVOCATION AND, written instrument

### LexisNexis(R) Headnotes

*Civil Procedure > Summary Judgment > Appellate Review > General Overview*

*Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview*

*Civil Procedure > Appeals > Standards of Review > De Novo Review*

[HN1] Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Utah R. Civ. P. 56(c)*. When reviewing the trial court's ruling in a motion for summary judgment, the appellate court considers all facts and inferences to be drawn therefrom in the light most favorable to the nonmoving party. The appellate court reviews the trial court's grant of summary judgment for correctness, according no deference to that court's legal conclusions. In addition, the appellate court may affirm a grant of summary judgment on any ground available to the trial court, even if it was not relied upon below.

*Estate, Gift & Trust Law > Trusts > Beneficiaries > General Overview*

*Estate, Gift & Trust Law > Trusts > Modification & Termination*

*Estate, Gift & Trust Law > Trusts > Trustees > General Overview*

[HN2] A trust is a form of ownership in which the legal title to property is vested in a trustee, who has equitable duties to hold and manage it for the benefit of the beneficiaries. Once the settlor has created the trust he is no longer the owner of the trust property and has only such

ability to deal with it as is expressly reserved to him in the trust instrument. Thus, a settlor has the power to modify or revoke a trust only if and to the extent that such power is explicitly reserved by the terms of the trust. Furthermore, the creation of a trust involves the transfer of property interests in the trust subject-matter to the beneficiaries. These interests cannot be taken from the beneficiaries except in accordance with a provision of the trust instrument.

*Estate, Gift & Trust Law > Trusts > Beneficiaries > Single Beneficiaries*

*Estate, Gift & Trust Law > Trusts > Modification & Termination*

[HN3] Vested beneficiary interests are subject to being divested by the exercise of the reserved power to amend or revoke the indenture in trust.

*Estate, Gift & Trust Law > Trusts > Beneficiaries > Single Beneficiaries*

*Estate, Gift & Trust Law > Trusts > Modification & Termination*

*Estate, Gift & Trust Law > Trusts > Revocable Living Trusts*

[HN4] Even a revocable trust clothes beneficiaries with a legally enforceable right to insist that the terms of the trust be adhered to.

**COUNSEL:** James H. Faust, Salt Lake City, for plaintiffs.

J. Jay Bullock, Clinton J. Bullock, Karen Bullock Kreeck, Salt Lake City, for defendant.

**JUDGES:** DURHAM, Chief Justice. Associate Chief Justice Durrant, Justice Howe, Justice Russon, and Justice Wilkins concur in Chief Justice Durham's opinion.

**OPINION BY:** DURHAM

**OPINION**



[\*\*1191] *DURHAM, Chief Justice:*

## INTRODUCTION

[\*P1] Decedent's children, Kenneth Alan Banks, Susan Banks Baker, and Bransford Michael Banks brought an action against decedent's sister, Nancy Means ("Ms. Means") seeking enforcement of a 1992 trust that was purportedly modified by a 1999 amendment. Under the terms of the 1999 amendment, Ms. Means would become the sole beneficiary of the trust, while the Banks children would become contingent beneficiaries. The trial court granted summary judgment in favor of the Banks children. Ms. Means appealed, arguing that the trial court erred by (1) granting the Banks children's motion for summary judgment, (2) denying Ms. Mean's cross-motion for summary judgment, and (3) admitting the [\*\*\*2] deposition testimony of attorney Joseph L. Platt. We affirm the trial court's grant of summary judgment and hold that the 1999 amendment did not effect a revocation of the trust as required by the trust language. Therefore, the terms of the original trust document govern the disposition of the trust estate and the remaining issues are moot.

## BACKGROUND

[\*P2] On April 15, 1992, the decedent, Betty A. Banks ("Ms. Banks"), executed a document entitled the "Betty A. Banks Family Protection Trust," which was prepared by her attorney, Joseph L. Platt ("Mr. Platt"). As required by the terms of the trust, Ms. Banks, as settlor, transferred certain property into the trust and served as trustee until her death on August 24, 1999.

[\*P3] The trust provides that upon the death of Ms. Banks, the Banks children were to share equally in the proceeds of the trust estate and serve as joint trustees. Article I of the trust, "PURPOSES AND BIRTH DATES," declares "This Trust is established for the primary benefit of the Undersigned during the Undersigned's

lifetime, for the Undersigned's family thereafter." The document then names Ms. Banks' family as Kenneth Alan Banks, Susan Banks Baker, [\*\*\*3] and Bransford Michael Banks. Article IV, "DISPOSITION ON THE DEATH OF THE UNDERSIGNED," designates the Banks children as joint beneficiaries of the trust estate upon Ms. Banks' death. Article VI, "TRUSTEE PROVISIONS," names the Banks children as joint successor trustees.

[\*P4] The trust agreement provides that the trust is revocable, and that Ms. Banks, as settlor, can amend certain portions of the trust, subject to the provisions of the trust language. Article III provides:

### AMENDMENT, REVOCATION AND ADDITIONS TO TRUST

3.1 Rights of the Undersigned. As long as the Undersigned is alive, the Undersigned reserves the right to amend, modify or revoke this Trust in whole or in part, including the principal, and the present or past undisbursed income from such principal. Such revocation or amendment of this Trust may be in whole or in part by written instrument. Amendment, modification or revocation of this instrument shall be effective only when such change is delivered in writing to the then acting Trustee. On the revocation of this instrument in its entirety, the Trustee shall deliver to the Undersigned, as the Undersigned may direct in the instrument of revocation, all of the [\*\*\*4] Trust property.

3.2 Interests of the Beneficiaries. The interests of the beneficiaries are presently vested interests subject to divestment which shall continue until this Trust is revoked or terminated other than by death. As long as this Trust subsists, the Trust properties and all the rights and privileges hereunder shall be controlled and exercised by the Trustee named herein in their fiduciary capacity.

[\*P5] In August 1999, Ms. Banks executed an amendment to the trust. The amendment consists of three replacement pages in-

serted into the trust document. It does not change article I of the trust, which states that the trust's purpose is to benefit Ms. Banks during her lifetime and her family thereafter, and names the Banks children as her family. The amendment does, however, change the beneficiaries and the successor trustees. The amendment changes article IV, "DISPOSITION ON THE DEATH OF THE UNDERSIGNED," [\*\*1192] to allocate 100% of the trust estate to Ms. Banks' older sister, Ms. Means, on the death of Ms. Banks, with the Banks children listed as alternate beneficiaries should Ms. Means predecease Ms. Banks. In addition, article VI of the amendment, "TRUSTEE PROVISIONS," changes [\*\*\*5] the successor trustee to Ms. Means, with the Banks children to serve as joint successor trustees if Ms. Means predeceases Ms. Banks.

[\*P6] After Ms. Banks died in August, 1999, the parties disputed whether the 1999 amendment or the original trust agreement governed the disposition of the trust. On October 14, 1999, the Banks children filed a complaint against Ms. Means seeking, among other things, a finding that they were the rightful trustees and beneficiaries of the trust, and were therefore entitled to the trust proceeds. Ms. Means counterclaimed, asserting that the 1999 amendment governed the disposition of the trust and that she was the sole beneficiary. After a series of motions and cross-motions, the trial court granted the Banks children's motion for summary judgment, and this appeal followed.

## STANDARD OF REVIEW

[\*P7] [HN1] Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Utah R. Civ. P. 56(c)*; *Gerbich v. Numed, Inc.*, 1999 UT 37, P10, 977 P.2d 1205. When reviewing the trial court's ruling in a motion for summary judgment, we consider all facts and [\*\*\*6] infer-

ences to be drawn therefrom in the light most favorable to the nonmoving party. *Peterson v. Sunrider Corp.*, 2002 UT 43, P13, 446 Utah Adv. Rep. 40. We review the trial court's grant of summary judgment for correctness, according no deference to that court's legal conclusions. *Oxendine v. Overturf*, 1999 UT 4, P7, 973 P.2d 417; *State v. Pena*, 869 P.2d 932, 936 (Utah 1994). In addition, we may affirm a grant of summary judgment on any ground available to the trial court, even if it was not relied upon below. *Bailey v. Boyles*, 2002 UT 58, P10, \_\_\_ P.3d \_\_; *Higgins v. Salt Lake County*, 855 P.2d 231, 235 (Utah 1993).

## ANALYSIS

[EDITOR'S NOTE: TEXT WITHIN THESE SYMBOLS [O><O] IS OVERSTRUCK IN THE SOURCE.]

[\*P8] Ms. Means argues that the trial court erred when it (1) granted the Banks children's motion for summary judgment, (2) denied Ms. Means' motion for summary judgment, and (3) determined that the attorney-client privilege did not protect Mr. Platt's deposition statements.<sup>1</sup> When the trial court granted summary judgment to the Banks children, it found that the[O>ir<O] children's [\*\*\*7] interest in the trust was vested subject to divestiture only through a revocation of the trust, that the trust was never revoked, and that the Banks children were therefore the sole beneficiaries of the trust and entitled to receive disbursement of the trust corpus as set forth in the original trust document.

1 These statements were relevant to the Banks children's claim of undue influence or lack of capacity to amend the trust; because of our disposition of the other questions on appeal, we do not reach this issue.

## I. THE TERMS OF THE ORIGINAL TRUST AGREEMENT

[\*P9] It is well settled [HN2] that "[a] trust is a form of ownership in which the legal title to property is vested in a trustee, who has equitable duties to hold and manage it for the benefit of the beneficiaries." *Continental Bank & Trust Co. v. Country Club Mobile Estates, Ltd.*, 632 P.2d 869, 872 (Utah 1981)(citing *Restatement (Second) of Trusts* § 2 (1959)). "Once the settlor has created the trust he is no longer the owner [\*\*\*8] of the trust property and has only such ability to deal with it as is expressly reserved to him in the trust instrument." *Id.* (citing *Boone v. Davis*, 64 Miss. 133, 8 So. 202 (Miss. 1886)). Thus, a settlor has the power to modify or revoke a trust only if and to the extent that such power is explicitly reserved by the terms of the trust. *Continental Bank*, 632 P.2d at 872; see also *Kline v. Utah Dep't. of Health*, 776 P.2d 57, 61 (Utah Ct. App. 1989)(citing *Restatement (Second) of Trusts* §§ 330-331 (1959)); accord *Clayton v. Behle*, 565 P.2d 1132, 1133 (Utah 1977). Furthermore, "the creation of a trust involves the transfer of [\*\*1193] property interests in the trust subject-matter to the beneficiaries. These interests cannot be taken from [the beneficiaries] except in accordance with a provision of the trust instrument." George G. Bogert & George T. Bogert, *Trusts & Trustees* § 998 (2d ed. rev. 1983). Thus, our analysis begins with an examination of the original trust language to see what powers Ms. Banks reserved for herself as the trustee and what beneficial interests she created.<sup>2</sup>

2 Ms. Banks was the settlor of the trust, the "Undersigned" in the trust document, and the trustee of the trust once it was created.

#### [\*\*\*9] A. Revocation

[\*P10] Article III, entitled "AMENDMENT, REVOCATION AND ADDITIONS TO TRUST," clearly reserves the settlor's right to amend, modify or revoke the trust. Section 3.1 states "Rights of the Undersigned. . . . The Undersigned reserves the right

to amend, modify or revoke this Trust in whole or in part . . . ." The trust specifies that "revocation or amendment of this Trust may be in whole or in part by written instrument. Amendment, modification or revocation of this instrument shall be effective only when such change is delivered in writing to the then acting Trustee." However, the trust indicates that in the case of complete revocation, "the Trustee shall deliver to the Undersigned, as the Undersigned may direct in the instrument of revocation, all of the Trust property." Thus, the trust specifies that for Ms. Banks to completely revoke the trust, all the property must be transferred back to Ms. Banks, after which she could presumably create a new trust or dispose of the property as she saw fit.

[\*P11] It is clear from the trust language that Ms. Banks reserved for herself the power to amend, modify, or revoke the trust in whole or in part. Any such changes [\*\*\*10] were to be specified in writing and delivered to her, but in the case of a complete revocation, all the property in the trust was also to be delivered to Ms. Banks. Revocation is therefore a specific provision of the trust language and is not the same as an amendment or modification.

#### B. Beneficiary Interests

[\*P12] Next, we examine the trust agreement to see what interests Ms. Banks created for the trust beneficiaries. Section 3.2 reads, "Interests of the Beneficiaries. The interests of the beneficiaries are presently vested interests subject to divestment which shall continue until this Trust is revoked or terminated other than by death." By the plain language of the trust, the beneficiaries have "vested interests" <sup>3</sup> that continue until the interests are "revoked or terminated." Here, Ms. Banks reserved the power to revoke, modify, or amend the trust in whole or in part in section 3.1, but limited that power in section 3.2 with regard to the beneficiaries. Thus, a complete revocation was required to divest the beneficiaries of their vested interests.

3 A "vested" interest is something "that has become a completed, consummated right for present or future enjoyment; not contingent; unconditional; absolute. . . . An interest may be vested, even where it does not carry a right to immediate possession, if it does confer a fixed right of taking possession in the future." *Black's Law Dictionary* 1557 (7th ed. 1999).

[\*\*\*11] [\*P13] Ms. Means relies on *In re Estate of Groesbeck*, 935 P.2d 1255 (Utah 1997) for the proposition that the language in section 3.2 merely proves that the trust is not illusory and does not restrict Ms. Banks' rights to divest the Banks children of their vested interests. Her reliance is misplaced. In *Groesbeck* we held that a revocable trust can be created, without being deemed illusory, as long as title to the property passes to the trustee and vested interests are created in the beneficiaries, even if these interests are subject to divestiture. *Id.* at 1257-58 (citing *Horn v. First Sec. Bank of Utah, N.A.*, 548 P.2d 1265, 1267 (Utah 1976)). That is, a reservation of the power to revoke does not make a trust invalid. *Id.* at 1257. We further observed that [HN3] vested beneficiary interests are "subject to being divested by the exercise of the reserved power to amend or revoke the indenture in trust." *Id.* at 1258. Thus, we concluded that the trust was valid, even though the Groesbecks had reserved the right to revoke the trust and created vested beneficiary interests that were subject [\*\*1194] to divestiture via the specific provisions [\*\*\*12] of the trust itself. <sup>4</sup> *Id.* at 1258. *Groesbeck*, therefore, does not require us to disregard the requirements of the trust language.

4 The *Groesbeck* trust language was remarkably similar to the trust language at issue here: "The interest of the beneficiaries is a present interest which shall continue until this Trust is revoked or terminated other than by death." *Id.* at 1258. In that case, however, we were not

called upon to determine whether a revocation had taken place that would have divested the beneficiaries of their interests. *Id.*

[\*P14] Ms. Banks reserved the right to amend, modify, or revoke the trust, specified how such changes were to be accomplished, and created vested beneficiary interests that could be divested only though a complete revocation of the trust. Our next step, therefore, is to look to the 1999 amendment to see whether it complied with the terms of the trust.

## II. THE 1999 AMENDMENT

[\*P15] The 1999 amendment contains two primary changes. First, it changes [\*\*\*13] article IV, "DISPOSITION ON THE DEATH OF THE UNDERSIGNED," to allocate 100% of the trust estate to Ms. Means on the death of Ms. Banks. Second, article VI, "TRUSTEE PROVISIONS," changes Ms. Banks' successor trustee from the Banks children to Ms. Means, unless Ms. Means predeceases Ms. Banks. Thus, the 1999 amendment sought to change the beneficiary status of the Banks children, thereby divesting them of their vested interests in the trust. <sup>5</sup> As discussed earlier, the Banks children had vested interests in the trust which could only be divested according to the terms of the original trust document. Therefore, the 1999 amendment falls within the purview of article III, section 3.2 of the trust, which provides that beneficiary interests are only subject to divestiture via a revocation of the trust, and section 3.1, which requires that upon revocation the trust property must be delivered to Ms. Banks.

5 Also notable is what the 1999 amendment did not do. It did not change the language in article I, stating that the purpose of the trust was for Ms. Banks and her family thereafter, or the specific identifications by name and birthdate of the Banks children as her family. Accept-

2002 UT 65, \*; 52 P.3d 1190, \*\*;  
452 Utah Adv. Rep. 10; 2002 Utah LEXIS 92, \*\*\*

ing Ms. Means' interpretation of the 1999 amendment would thus render some language null and void, and contravene the stated purpose of the Betty A. Banks Family Protection Trust.

[\*\*\*14] [\*P16] Neither of these requirements were met. Ms. Banks did not divest the Banks children of their vested interests in the trust because she did not completely revoke the trust in the 1999 amendment. In other words, the 1999 amendment did not effect a revocation of the trust that would have properly divested the Banks children of their vested interests under the terms of the trust itself. As we have previously stated, [HN4] "even a revocable trust clothes beneficiaries . . . with a legally en-

forceable right to insist that the terms of the trust be adhered to." *Continental Bank & Trust Co. v. Country Club Mobile Estates, Ltd.*, 632 P.2d 869, 872 (Utah 1981).

## CONCLUSION

[\*P17] We affirm the district court's grant of summary judgment to the Banks children and find that the Betty A. Banks Family Protection Trust dated April 15, 1992, governs the disposition of the estate of Betty A. Banks.

[\*P18] Associate Chief Justice Durrant, Justice Howe, Justice Russon, and Justice Wilkins concur in Chief Justice Durham's opinion.

Tab 4



Positive  
As of: Apr 22, 2010

**In the matter of the Estate of Almon J. Flake, Deceased. Marian R.  
Flake, Plaintiff and Appellant, v. Joel Flake, Defendant and Appellee.**

**No. 20010478**

**SUPREME COURT OF UTAH**

***2003 UT 17; 71 P.3d 589; 472 Utah Adv. Rep. 18; 2003 Utah LEXIS 36***

**May 2, 2003, Filed**

**SUBSEQUENT HISTORY:** [\*\*\*1] The Name of this Case has been Corrected by the Court May 5, 2003. Rehearing Denied June 17, 2003. Released for Publication June 24, 2003. Rehearing denied by *In re Flake, 2003 Utah LEXIS 68 (Utah, June 17, 2003)*

**PRIOR HISTORY:** Second District, Farmington. The Honorable Jon M. Memmott.

**DISPOSITION:** Trial court judgment affirmed in part and reversed in part.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Appellant spouse appealed the judgment of the Second District Court, Farmington (Utah), that dismissed the spouse's suit regarding the enforceability of the decedent's trust.

**OVERVIEW:** The spouse argued, inter alia, that a settlement agreement, as an oral agreement with testamentary effect, was unenforce-

able. The supreme court disagreed. Prior to filing any claims, the parties met to discuss the possibility of a settlement agreement. Based on the actions of the parties prior to and after the April 14, 1999 settlement meeting, the trial court correctly ruled that the parties entered into an enforceable settlement agreement. The parties were each accompanied by legal representatives at the meeting. The parties agreed to essential terms regarding the life estate, distribution of the Cadillac, payment of outstanding creditors, ownership in the life insurance policies and funeral plan, disposition of the tax proceeds, use and condition of a barn, as well as additional items of personal property. Therefore, the trial court did not err.

**OUTCOME:** The judgment was affirmed as to the motion to dismiss, but the judgment was reversed as to the enforceability of the original 1987 trust agreement.

**CORE TERMS:** trust agreement, restatement, beneficiary, settlement agreement, revocation, restated, amend, settlor, modify, lis pendens,

revoke, notice, beneficial interest, reserved, vested, decedent's, vested interest, known right, enforceable, revoked, relinquishment, divestiture, citations omitted, power to revoke, power to modify, modification, terminated, distinctly, relinquish, supercede

## **LexisNexis(R) Headnotes**

*Civil Procedure > Judgments > Relief From Judgment > General Overview*

*Civil Procedure > Appeals > Standards of Review > General Overview*

*Estate, Gift & Trust Law > Trusts > Interpretation*

[HN1] The validity of a trust is an issue of law, which an appellate court reviews for correctness. The grant of a motion to dismiss is likewise a matter of law, which the appellate court reviews for correctness.

*Estate, Gift & Trust Law > Trusts > Beneficiaries > General Overview*

*Estate, Gift & Trust Law > Trusts > Trustees > Duties & Powers > General Overview*

*Governments > Fiduciary Responsibilities*

[HN2] A trust is an arrangement for the ownership of property. The nature of the arrangement is such that the legal title of the property is held by the trustee, but the benefit and enjoyment of the property resides with the beneficiaries. It is well settled that a trust is a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held the trustee to equitable duties to deal with the property for the benefit of another person the beneficiary, which arises as a result of a manifestation by the settlor, or trustor of an intention to create it. There must be an intent by the settlor to confer a beneficial interest in the property in some other person. To create an inter vivos trust, a settlor must have an intent to create a presently enforceable trust, the trust

property must be clearly specified and set aside, and the essential terms of the trust must be clear enough for the court to enforce the equitable duties that are the sine qua non of a trust relationship.

*Estate, Gift & Trust Law > Trusts > Beneficiaries > General Overview*

*Estate, Gift & Trust Law > Trusts > Trustees > Duties & Powers > General Overview*

[HN3] A trust is a form of ownership in which the legal title to property is vested in a trustee, who has equitable duties to hold and manage it for the benefit of beneficiaries. The trustee has exclusive control of the trust property, subject only to the limitations imposed by law or the trust instrument, and once the settlor has created the trust he is no longer the owner of the trust property and has only such ability to deal with it as is expressly reserved to him in the trust instrument. A trust must have an identifiable beneficiary who is capable of enforcing the equitable duties of the trustee. The transfer of property interests to the beneficiaries cannot be taken from them except in accordance with a provision of the trust instrument.

*Civil Procedure > Settlements > Settlement Agreements > Modifications*

*Estate, Gift & Trust Law > Trusts > Interpretation*

*Estate, Gift & Trust Law > Trusts > Modification & Termination*

[HN4] Absent fraud or mistake, a settlor has the power to modify a trust only if and to the extent that such a power was reserved by the terms of the trust. The same rule applies to a settlor's power to revoke a trust. Ordinarily, if a power to modify is subject to no restrictions, then a reserved power to amend or modify includes the power to revoke. However, the settlor cannot modify the trust if, by the terms of the trust, he did not reserve a power of modification. Likewise, if the settlor reserves a



2003 UT 17, \*, 71 P.3d 589, \*\*;  
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power to modify the trust only in a particular manner or under particular circumstances, he can modify the trust only in that manner or under those circumstances. However, if the settlor does not specify the method of modification, then the power may be exercised by any method which sufficiently manifests his intention to modify the trust. In interpreting the terms of a trust, the proper focus of inquiry is the settlor's intent.

***Estate, Gift & Trust Law > Trusts > Beneficiaries > Single Beneficiaries***

***Estate, Gift & Trust Law > Trusts > Modification & Termination***

[HN5] A trust that specifies revocation of a vested beneficiary interest through divestiture may only divest those beneficiary interests through a complete revocation of the trust. A reservation of the power to revoke does not make a trust invalid.

***Estate, Gift & Trust Law > Trusts > Modification & Termination***

[HN6] The revocation of a trust is required when terminating a vested beneficial interest.

***Estate, Gift & Trust Law > Trusts > Beneficiaries > General Overview***

***Estate, Gift & Trust Law > Trusts > Modification & Termination***

***Estate, Gift & Trust Law > Trusts > Revocable Living Trusts***

[HN7] A revocable trust can be created, without being deemed illusory, as long as title to the property passes to the trustee and vested interests are created in the beneficiaries, even if these interests are subject to divestiture. The reservation of a power to amend, modify, or revoke does not make a trust invalid or incomplete. The vested beneficiary interests are subject to divestiture through operation of the spe-

cific provisions of the trust, namely the reserved power to amend, modify, or revoke.

***Business & Corporate Law > Corporations > Governing Documents & Procedures > Articles of Incorporation & Bylaws > General Overview***

[HN8] See *Utah Code Ann. § 48-2c-409*.

***Business & Corporate Law > Corporations > Governing Documents & Procedures > Articles of Incorporation & Bylaws > General Overview***

[HN9] A restated document that not only restates and integrates the operative provisions but also amends the operative provisions shall so state with the appropriate language. *Utah Code Ann. § 48-2c-409(2), (3)*. If the restated articles only restate and integrate, and do not further amend the provisions of the articles of organization as previously amended or supplemented, and there is no discrepancy between those provisions and the provisions of the restated articles, they must so state. *§ 48-2c-409(4)(b)*.

***Estate, Gift & Trust Law > Trusts > Administration***

[HN10] See *Utah Code Ann. § 75-3-912*.

***Governments > Legislation > Interpretation***

[HN11] When faced with a question of statutory construction, and in attempting to determine legislative intent, an appellate court first looks to the plain language of the statute. In construing a statute, the appellate court assumes that each term in the statute was used advisedly; thus the statutory words are read literally, unless such a reading is unreasonably confused or inoperable. Only if the appellate court finds some ambiguity in the statute's plain language need it look further, and only then

need the appellate court seek guidance from the legislative history and relevant policy considerations.

***Estate, Gift & Trust Law > Trusts > General Overview***

***Governments > Legislation > Interpretation Insurance Law > Life Insurance > Beneficiaries > Changes***

[HN12] An appellate court will not look beyond the language to divine legislative intent; the language is clear and unambiguous.

***Contracts Law > Types of Contracts > Oral Agreements***

***Estate, Gift & Trust Law > Trusts > Creation Estate, Gift & Trust Law > Trusts > Revocable Living Trusts***

[HN13] A written agreement is not required to alter interests created by an inter vivos trust. The issue of whether an oral contract or agreement exists presents questions of both law and fact. Whether a contract has been formed is ultimately a conclusion of law, but that ordinarily depends on the resolution of subsidiary issues of fact. While an appellate court does not defer to the trial court's legal conclusions in reviewing them for correctness, it does defer to factual findings, and will not set them aside unless they are clearly erroneous. A trial court's finding of fact is not clearly erroneous unless it is against the clear weight of the evidence or we reach a definite and clear conclusion that a mistake has been made.

***Civil Procedure > Settlements > Settlement Agreements > Enforcement > General Overview***

***Contracts Law > Types of Contracts > Oral Agreements***

***Contracts Law > Types of Contracts > Settlement Agreements***

[HN14] The terms and conditions of an oral agreement must be sufficiently definite to allow it to be enforced. In determining whether the parties created an enforceable contract, a court should consider all preliminary negotiations, offers, and counteroffers and interpret the various expressions of the parties for the purpose of deciding whether the parties reached agreement on complete and definite terms. An agreement cannot be enforced if its terms are indefinite or demonstrate that there was no intent to contract.

***Contracts Law > Consideration > Enforcement of Promises > General Overview***

***Insurance Law > Life Insurance > Burial Insurance***

***Real Property Law > Estates > Present Estates > Life Estates***

[HN15] An agreement cannot be enforced if its terms are indefinite or demonstrate that there was no intent to contract.

***Civil Procedure > Settlements > Settlement Agreements > Enforcement > General Overview***

***Civil Procedure > Settlements > Settlement Agreements > Validity***

***Contracts Law > Contract Conditions & Provisions > Waivers > General Overview***

[HN16] Waiver is an intentional relinquishment of a known right. It must be distinctly made, although it may be express or implied. To constitute a waiver, there must be an existing right, benefit, or advantage, a knowledge of its existence, and an intention to relinquish it. The relinquishment must be distinctly made, although it may be express or implied.

***Contracts Law > Contract Conditions & Provisions > Waivers > General Overview***

[HN17] Waiver of a contractual right occurs when a party to a contract intentionally acts in a

manner inconsistent with its contractual rights, and, as a result, prejudice accrues to the opposing party or parties to the contract.

*Civil Procedure > Remedies > Costs & Attorney Fees > General Overview*  
*Real Property Law > Nonmortgage Liens > Judgment Liens*  
[HN18] See *Utah Code Ann. § 38-12-103(a)*.

*Civil Procedure > Remedies > Costs & Attorney Fees > General Overview*  
*Real Property Law > Nonmortgage Liens > Judgment Liens*  
[HN19] See *Utah Code Ann. § 38-12-103(b)*.

*Civil Procedure > Remedies > Lis Pendens > Notices*  
*Real Property Law > Nonmortgage Liens > Judgment Liens*  
*Real Property Law > Priorities & Recording > Lis Pendens*  
[HN20] *Utah Code Ann. § 38-12-103(2)* provides for penalties to a lien claimant for non-compliance with the notice requirements or for a willful refusal to release the lien.

*Contracts Law > Remedies > Restitution*  
[HN21] A trial court has power to order restitution in an independent suit, or upon a motion filed in the original. Restitution upon the reversal of a judgment is not of mere right. It is ex gratia, resting in the exercise of sound discretion.

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Loren D. Martin, Salt Lake City, for plaintiff.

**JUDGES:** DURHAM, Chief Justice. Associate Chief Justice Durrant, Justice Russon, Justice

Wilkins, and Judge Greenwood concur in Chief Justice Durham's opinion. Having recused himself, Justice Howe does not participate herein; Court of Appeals Judge Pamela T. Greenwood sat.

## OPINION BY: DURHAM

## OPINION

[\*\*591] *DURHAM, Chief Justice:*

## INTRODUCTION

[\*P1] Decedent's spouse, Marian Flake (Mrs. Flake), brought an action against the Almon J. Flake Family Trust, seeking enforcement of the trust dated September 22, 1987 (the 1987 Trust Agreement) and making numerous claims regarding her rights as a beneficiary. The 1987 Trust Agreement was purportedly modified or replaced by a subsequent trust document entitled Restatement of the Almon J. Flake Family Trust dated October 30, 1998 (the 1998 Restatement). The 1998 Restatement purported to change significantly many of Mrs. Flake's benefits as outlined in the 1987 Trust Agreement. Prior [\*\*\*2] to the filing of any action, the parties met to discuss a possible settlement. Joel Flake, as trustee (the trustee) filed a motion before trial to enforce the settlement agreement that he claimed was reached on April 14, 1999 (the 1999 Settlement Agreement).

[\*P2] The trial court addressed the issues in two phases. In the first phase, the court considered whether the parties had reached an enforceable settlement agreement before the action was filed. The court held that the parties had reached a valid settlement agreement on several issues, but that there was no mutual release of claims. The second phase considered Mrs. Flake's claims of undue influence relating to the 1998 Restatement and the formation of JALCOM, L.L.C., a family limited liability company. The trustee filed a motion to dismiss, arguing that Mrs. Flake stated she had no evi-

dence to offer and would rely solely on the documents at issue. The trial court granted the trustee's motion to dismiss in part. The court concluded that the 1998 Restatement did not fully supercede the 1987 Trust Agreement, specifically holding that under the 1987 Trust Agreement Mrs. Flake was entitled to monthly support from the trust. The [\*\*\*3] court also determined that Mrs. Flake was entitled to receive the decedent's social security and retirement funds as outlined in the 1987 Trust Agreement.

[\*P3] Mrs. Flake appealed, arguing that the enforcement of an unexecuted agreement, [\*\*592] the 1999 Settlement Agreement, constitutes reversible error. She also contends that she held certain rights under the trust which can only be relinquished by express waiver. The trustee filed a cross-appeal arguing, among several issues, that the 1998 Restatement did in fact supercede the 1987 Trust Agreement. The trustee, therefore, contends that the Trust is entitled to a reimbursement of the support payments previously paid to Mrs. Flake. We affirm the trial court's granting of the trustee's motion to dismiss, but reverse the finding that the 1998 Restatement did not effect a revocation of the trust. We find that the 1998 Restatement fully replaced and superceded the original 1987 Trust Agreement. Therefore, the terms of the 1998 Restatement and subsequent 1999 Settlement Agreement govern the disposition of the trust estate.

## BACKGROUND

[\*P4] Almon J. Flake (Mr. Flake) and his first wife, Lois Flake, had five children. Mr. [\*\*\*4] Flake's first wife subsequently passed away. On September 22, 1987, Mr. Flake executed the 1987 Trust Agreement by which he created the "Almon J. Flake Family Trust." Shortly thereafter, on October 5, 1987, Mr. Flake married Marian R. Flake. Article II of the 1987 Trust Agreement states that "this trust is specifically designed for the use and benefit of

the Undersigned Almon J. Flake, *and spouse*, for the lifetime of the Undersigned, then for the use and benefit of the Undersigned's children, except as contained herein" (emphasis added). The 1987 Trust Agreement made "Special Provisions" for Mrs. Flake. Article VII of the 1987 Trust Agreement provides as follows:

### *SPECIAL PROVISIONS*

Upon the death of the Undersigned the Trust shall care for the needs of MARIAN R. FLAKE including her living arrangements in the home of the Undersigned or other reasonable living quarters which may include a unit in the Flake duplex, at her discretion.

...

B. The furnishings of the Flake home shall be used by Marian until her death as needed.

C. Marian shall also enjoy Almon's social security and all existing retirement funds.

...

F. Upon the death of Almon and Marian, all the remainder [\*\*\*5] of this trust estate shall be distributed to the Flake children, share and share alike, per stirpes. THESE SPECIAL PROVISIONS SHALL TAKE PRECEDENCE OVER ANY AND ALL OTHERS OF THIS TRUST AGREEMENT.

[\*P5] The 1987 Trust Agreement also stated that the trust was revocable, and that Mr. Flake as settlor could amend certain portions of the trust, subject to the provisions of the trust language. Article XIII of the 1987 Trust Agreement:

### *Revocation and Amendment*

A. As long as the Undersigned is alive, he reserves the right, without the consent or approval of any other, *to amend, modify, revoke, or remove from this Trust* the property that he has contributed, in whole or in part, including the principal and the present or past undis-

bursed income from such principal. (Emphasis added).

[\*P6] On October 30, 1998, Mr. Flake executed a document entitled the "Restatement of the Almon J. Flake Family Trust" (the 1998 Restatement), which states that "Almon J. Flake hereby *amends* and *restates in full* the Almon J. Flake Family Trust dated September 22, 1987." (emphasis added). In her brief, Mrs. Flake points out that Mr. Flake executed the 1998 Restatement during his final [\*\*\*6] illness and within two weeks of his death. She also suggests that Mr. Flake's children facilitated the changes he made, significantly reducing the extent of her interest in the 1987 Trust Agreement. However, we note that while Mrs. Flake originally asserted a claim of undue influence in this case, during the second phase of trial, she declined to pursue her claim. We are therefore precluded from considering anything that might be relevant to a claim of undue influence. Article IX of the 1998 Restatement makes the following provisions for Mrs. Flake:

[\*\*593] *Disposition at my Death*

C. *Vehicles.* If Marian R. Flake survives me she shall be distributed the Cadillac.

D. *Marian R. Flake.* If Marian R. Flake survives me, the main part of my home (located at 604 East 540 North in Centerville) shall be held in a separate trust as a life estate for her benefit. The trust shall pay the following costs associated with the property: property insurance, property taxes, electricity, heating fuel, water, and other city utilities. Marian R. Flake shall pay all other costs associated with the property including telephone charges and maintenance and upkeep costs. However, the Trustee shall have [\*\*\*7] discretion to pay such part or all of the maintenance costs of the home that the Trustee feels is appropriate.

[\*P7] After Mr. Flake died on November 15, 1998, the parties disputed whether the 1987 Trust Agreement or the 1998 Restatement governed the disposition of the trust. The trustee's

position was that the 1998 Restatement had entirely replaced the 1987 Trust Agreement. Mrs. Flake, however, contended that she was entitled to certain rights under the original trust agreement which could only be relinquished through express waiver. The parties met on April 14, 1999 in order to resolve their dispute and to discuss a possible settlement agreement. Mrs. Flake later filed a claim seeking enforcement of the original 1987 Trust Agreement. Pending the result of the litigation, Mrs. Flake filed a lis pendens on property subject to the trust, and argued that the recording of the lis pendens was done in order to give constructive notice that the property was subject to litigation. The trustee contends that Mrs. Flake improperly filed the lien and failed to provide notice within thirty days after recordation as required under *Utah Code Ann. sections 38-12-102 [\*\*\*8] and 103*. Appellee also argues that Mrs. Flake failed to release the lien within twenty days as required under *Utah Code Ann. section 38-9-4*. After a series of motions and cross-motions, the trial court granted the trustee's motion to dismiss and ruled on the pending issue of the lis pendens.

## STANDARD OF REVIEW

[\*P8] [HN1] The validity of the trust is an issue of law, which we review for correctness. *Groesbeck v. Groesbeck (In re Estate of Groesbeck)*, 935 P.2d 1255, 1257 (Utah 1997). The grant of a motion to dismiss is likewise a matter of law, which the appellate court reviews for correctness. *Thimmes v. Utah State Univ.*, 2001 UT App 93, P4, 22 P.3d 257, 258.

## ANALYSIS

[\*P9] The determinative questions on appeal are as follows: (1) whether the trial court erred in concluding that the 1998 Restatement did not fully supercede the 1987 Trust Agreement; (2) whether the trial court erred when it found that *section 75-3-912* of the Utah Uniform Probate Code is not applicable to nonpro-

bate transfers, such as trust administration in decedent's estates, and therefore does not apply to the 1999 Agreement; (3) [\*\*\*9] whether the trial court erred in failing to find that Mrs. Flake was estopped to make claims beyond the scope of the 1999 Settlement Agreement; (4) whether the trial court erred in failing to award attorneys' fees and costs relating to the lis pendens; and (5) whether the court should direct removal of the trustee. We reverse the ruling of the trial court as to the first issue, and affirm regarding the remaining issues.

[\*P10] In granting the trustee's motion to dismiss, the trial court found that the 1998 Restatement did not fully replace the 1987 Trust Agreement, and that the documents must be read together to determine the governing terms of the trust. We disagree, and hold that the 1987 Trust Agreement was entirely superceded by the 1998 Restatement. We further conclude that Mrs. Flake and the trustee reached an enforceable oral settlement agreement at a meeting held on April 14, 1999. However, the 1999 Settlement Agreement did not resolve all the issues between the parties, and thus did not include a release of claims nor did it preclude Mrs. Flake from asserting other claims against the trust to the extent they (1) are provided for in the 1998 Restatement and (2) were not [\*\*\*10] discussed and agreed upon at the April 14, 1999 settlement meeting.

#### [\*\*594] I. THE TERMS OF THE 1987 TRUST AGREEMENT

[\*P11] [HN2] A trust is an arrangement for the ownership of property. The nature of the arrangement is such that the legal title of the property is held by the trustee, but the benefit and enjoyment of the property resides with the beneficiaries. It is well settled that

[a] trust . . . is a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held [the trustee] to equitable duties to deal with the property for the benefit of another person [the benefici-

ary], which arises as a result of a manifestation [by the settlor, or trustor] of an intention to create it.

*In re Estate of West*, 948 P.2d 351, 353 (Utah 1997) (citing *Restatement (Second) of Trusts* § 2 (1959)). There must be an intent by the settlor to confer a beneficial interest in the property in some other person. To create an inter vivos trust,

[a] settlor must have an intent to create a presently enforceable trust, . . . the trust property must be clearly specified and set aside, . . . and the essential terms of the trust [\*\*\*11] must be clear enough for the court to enforce the equitable duties that are the sine qua non of a trust relationship.

*Sundquist v. Sundquist*, 639 P.2d 181, 183-84 (Utah 1981) (citations omitted).

[\*P12] [HN3] "A trust is a form of ownership in which the legal title to property is vested in a trustee, who has equitable duties to hold and manage it for the benefit of beneficiaries." *Cont'l Bank & Trust Co. v. Country Club Mobile Estates, Ltd.*, 632 P.2d 869, 872 (Utah 1981) (citing *Restatement (Second) of Trusts* § 2 (1959)). The trustee has exclusive control of the trust property, subject only to the limitations imposed by law or the trust instrument, and "once the settlor has created the trust he is no longer the owner of the trust property and has only such ability to deal with it as is expressly reserved to him in the trust instrument." *Id.* (citation omitted). A trust must have an identifiable beneficiary who is capable of enforcing the equitable duties of the trustee. The transfer of property interests to the beneficiaries "cannot be taken from them except in accordance with a provision of the trust instrument . . . ." George G. Bogert & [\*\*\*12] George T. Bogert, *Trusts & Trustees* § 998 (2d ed. rev. 1983).

#### A. Revocation

[\*P13] [HN4] Absent fraud or mistake, a settlor "has the power to modify a trust only if and to the extent that such a power was reserved by the terms of the trust." *Kline v. Utah Dep't of Health*, 776 P.2d 57, 61 (Utah Ct. App. 1989); see also *Restatement (Second) of Trusts* § 331. The same rule applies to a settlor's power to revoke a trust. *Restatement (second) of Trusts* § 331. Ordinarily, if a power to modify is subject to no restrictions, then a reserved power to amend or modify includes the power to revoke. *Id. cmt. h*. However, the settlor cannot modify the trust if, by the terms of the trust, he did not reserve a power of modification. *Id.* Likewise, "if the settlor reserves a power to modify the trust only in a particular manner or under particular circumstances, he can modify the trust only in that manner or under those circumstances." *Id. cmt. d*. However, as is the case with the 1987 Trust Agreement, if the settlor does not specify the method of modification, then "the power may be exercised by any method which sufficiently manifests his intention to modify [\*\*\*13] the trust." *Id. cmt. c*. In interpreting the terms of a trust, the proper focus of inquiry is the settlor's intent. *Leggroan v. Zion's Sav. Bank & Trust Co.*, 120 Utah 93, 99, 232 P.2d 746, 749 (1951).

[\*P14] In Article XIII of the 1987 Trust Agreement, Mr. Flake expressly reserved both the power to modify and the power to revoke the trust created in 1987. The terms of the 1987 Trust Agreement state that the "Undersigned" reserves the right "to amend, modify, [or] revoke" the Trust, and thus it is clear that the settlor, Mr. Flake, reserved the right to amend, modify, or revoke.

#### *Revocation and Amendment*

A. As long as the Undersigned is alive, he reserves the right, without the consent or approval of any other, to amend, modify, revoke, or remove from this Trust the [\*\*595] property that he has contributed, in whole or in part,

including the principal and the present or past undisbursed income from such principal.

The 1998 Restatement clearly states that it amends the 1987 Trust Agreement.

[\*P15] We agree with the trial court's conclusion that the 1998 Restatement, absent an explicit revocation, is construed only as a modification of the 1987 Trust [\*\*\*14] Agreement. However, we find that although the 1998 Restatement amended, or modified, the 1987 Trust Agreement and did not revoke it in its entirety, the terms and contents of the 1998 Restatement did fully supercede all of the operative provisions of the original 1987 Trust Agreement.

#### *B. Beneficiary Interests*

[\*P16] This court recently held in *Banks v. Means*, 2002 UT 65 P14, 52 P.3d 1190, that [HN5] a trust that specified revocation of a vested beneficiary interest through divestiture could only divest those beneficiary interests through a complete revocation of the trust. "Mrs. Banks reserved the power to revoke, modify, or amend the trust in whole or in part," and "limited that power in [a subsequent section] with regard to the beneficiaries." *Banks*, 2002 UT 65 at P12. "[A] complete revocation [or termination] was required to divest the beneficiaries of their vested interest." *Id.* The appellant in *Banks* relied on *Groesbeck*, 935 P.2d 1255, arguing that the limiting language merely proved that the trust was not illusory and did not restrict the grantor's right to divest the beneficiaries of their vested interests. [\*\*\*15] The court in *Groesbeck* held that a reservation of the power to revoke does not make a trust invalid. *Id.* at 1257. However, in *Banks*, this court noted that Mrs. Banks reserved the right to amend, modify, or revoke the trust, specified how such changes were to be accomplished, and created vested beneficiary interests that could be divested only through a complete revocation or termination of the trust. *Banks*, 2002 UT 65 at P14.<sup>1</sup>

1 The trustee argues that to hold that a vested interest cannot be revoked or that the vested beneficiary assets cannot be modified is to nullify thousands of outstanding trust agreements. However, we do not hold that a vested beneficiary interest can never be revoked, but only that the revocation is subject to the terms of the individual trust agreement. Here, the trust agreement specifically states that the vested beneficiary interests can only be divested or revoked through a complete revocation or termination of the Trust.

[\*P17] As [\*\*\*16] in *Banks*, Mr. Flake reserved the right "to amend, modify, [or] revoke" the trust and later stated that the vested beneficiary interests shall continue until revocation or termination of the Trust other than by death. Here, Article XIV of the 1987 Trust Agreement states as follows:

#### *Vested Interest of Beneficiaries*

The interest of the beneficiaries is a present vested interest which shall continue until the Trust is revoked or terminated other than by death.

The 1987 Trust Agreement language can be distinguished from the language used in *Banks*. The limiting language in *Banks* was subject to a beneficial interest that was to be revoked or terminated through a complete divestiture of that beneficial interest. The relevant language from the trust in *Banks* is as follows:

#### *Article III*

#### *AMENDMENT, REVOCATION AND ADDITIONS TO THE TRUST*

3.2 *Interests of the Beneficiaries.* The interests of the beneficiaries are presently vested interests *subject to divestment* which shall con-

tinue until this Trust is revoked or terminated other than by death. (Emphasis added).

*Banks*, 2002 UT 65 at P4. This language at issue lacks any reference [\*\*\*17] to a *complete* divestiture. The beneficial interest of Mrs. Flake was merely amended, and not completely divested as was the case in *Banks*. The dispositive issue in the present case is whether there was a complete divestiture of a beneficial interest as in *Banks*, or whether there was simply a change in the quality, or scope, of the beneficial interest. We held in *Banks* that [HN6] revocation was required when terminating a vested beneficial interest. 2002 UT 65 at P14. [\*\*596] Here, we find that there is no requirement of revocation where the beneficial interest is simply modified or amended but not terminated. Therefore, Mrs. Flake's beneficial interest, as amended, was completely outlined in the 1998 Restatement, inasmuch as the 1998 Restatement contained all of the operative provisions of the Almon J. Flake Family Trust. The purpose and primary effect of Article XIV in the 1987 Trust Agreement is to save the Trust from the doctrine of merger and to prove that the Trust is not illusory.<sup>2</sup>

2 In *Groesbeck*, we held that [HN7] a revocable trust can be created, without being deemed illusory, as long as title to the property passes to the trustee and vested interests are created in the beneficiaries, even if these interests are subject to divestiture. 935 P.2d at 1257-58 (citing *Horn v. First Sec. Bank of Utah, N.A.*, 548 P.2d 1265, 1267 (Utah 1976)). The relative Trust language in *In re Estate of Groesbeck* specified that "the interest of the beneficiaries is a present interest which shall continue until this Trust is revoked or terminated other than by death." 935 P.2d at 1258. The reservation of a power to amend, modify, or revoke does not make a trust invalid or incomplete. See *Restatement (Second) of*



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*Trusts* § 331, cmt. j. As in *In re Estate of Groesbeck*, the vested beneficiary interests are subject to divestiture through operation of the specific provisions of the trust, namely the reserved power to amend, modify, or revoke.

## \*\*\*18] II. THE 1998 RESTATEMENT

[\*P18] We next examine whether the 1998 Restatement complied with the terms of the original trust and either (1) effected a revocation of the 1987 Trust Agreement or (2) was solely a modification as an amendment to the 1987 Trust Agreement.

[\*P19] The question concerns the effect and disposition of a "restated" trust agreement. The trial court held that absent an express revocation, the 1998 Restatement did not fully replace the 1987 Trust Agreement, and that the documents therefore must be read together to determine the governing terms of the trust. We disagree, and hold that the 1998 Restatement did, in fact, fully supercede the 1987 Trust Agreement.

[\*P20] The meaning of the term "restate" as it applies to an inter vivos trust document has not been established in Utah. We therefore look to other areas of trust law and the law of other states for guidance. In the law of business trusts, the meaning of a "restated" trust has been defined by statute in several states. These statutes address the meaning of a restated trust as it applies to various forms of corporate governance. For example, in Nevada "a certificate of trust may be restated [\*\*\*19] by *integrating into a single instrument* all the provisions of the original certificate [or trust instrument], and all amendments to the certificate, which are then in effect or are to be made by the restatement." (Emphasis added). *Nev. Rev. Stat.* 88A.220(2) (2002); *see also Del. Code Ann.* 12 § 3810 (c)(1) (2002); *S.D. Codified Laws* §§ 47-14A-45 (2002). Thus, state legislatures in some states have codified the meaning of a restated business trust, providing that a trust may be re-

stated by integrating into a single instrument all of the operative provisions of the trust.<sup>3</sup>

3 We do not intend to imply that a trust may only be restated if it has been expressly authorized by statute; we merely look to these various statutes to clarify the meaning of the terms "restated" and "restatement" in the 1998 Restatement Agreement.

[\*P21] In the Utah Revised Limited Liability Company Act (the Act), the Utah legislature [\*\*\*20] addressed, in another context, the meaning of the term "restatement." *Utah Code Ann.* § 48-2c-409. The Act states that [HN8] "[a] company may integrate into a single document all of the provisions of its articles of organization and amendments thereto, and it may . . . further amend its articles of organization, by adopting restated or amended and restated articles of organization." *Id.* The Act further clarifies that [HN9] a restated document that not only restates and integrates the operative provisions but that also amends the operative provisions shall so state with the appropriate language. *Id.* § 48-2c-409(2), (3). "If the restated articles only restate and integrate, and do not further amend the provisions of the articles of organization as previously amended or supplemented, and there is no discrepancy between those provisions and the provisions of the restated articles, they must so state." *Id.* § 48-2c-409(4)(b).

[\*P22] In this case, the 1998 Restatement was titled a "Restatement" and declared that [\*\*597] it "amended and restated *in full*" (emphasis added) the 1987 Trust Agreement. Although it did not detail the provisions of the trust that [\*\*\*21] were specifically amended, as a restatement it merged all of the operative provisions of the 1987 Trust Agreement together with amendments in a single instrument, and therefore superceded the 1987 Trust Agreement. The clear and unambiguous language of the 1998 Restatement demonstrated

that it was intended to supplant the terms of the 1987 Trust Agreement with amended and restated terms. The 1998 Restatement unambiguously references the "Almon J. Flake Family Trust dated September 22, 1987" as "amended and restated in full," and therefore reflects the settlor's intent to supplant the 1987 Trust Agreement. *See Restatement (Second) OF Trusts* § 331, cmt. c (stating that if the settlor reserves a power to modify or revoke the trust without specifying the method of modification, the power can be exercised in any manner which manifests the intent of the settlor to modify). In particular, the 1987 Trust Agreement provisions that provide for the "needs of MARIAN R. FLAKE" and which state that "Marian shall also enjoy Almon's Social Security and all existing retirement funds" were superceded due to their omission from the 1998 Restatement. Mrs. Flake is entitled only to what was provided [\*\*\*22] for in the operative provisions of the 1998 Restatement.

### III. THE 1999 SETTLEMENT AGREEMENT

[\*P23] On April 14, 1999, prior to filing any claims, the parties met to discuss the possibility of a settlement agreement. The 1999 Settlement Agreement confirmed the distribution of the Cadillac to Mrs. Flake, as outlined in the 1998 Restatement. It was also agreed that Mrs. Flake would be the beneficiary of the life estate as outlined in the 1998 Restatement. The trust agreed to pay certain specified debts, and Mrs. Flake agreed to immediately close the accounts giving rise to the debts. Provisions concerning the disposition of additional assets were also outlined in the 1999 Settlement Agreement, including a provision releasing the trust from any other claim that Mrs. Flake may have been able to make under the 1987 Trust Agreement. Since family settlement agreements are "favorites of the law," it is the general policy to encourage these types of agreements. *In re Estate of Grimm*, 784 P.2d 1238, 1243 (Utah Ct. App. 1989), cert. denied, 795 P.2d 1138 (Utah 1990) ("it is said that the law looks with favor

upon an agreement of compromise among members [\*\*\*23] of a family . . . ." (quotations and citations omitted)).

#### A. Oral Agreements

[\*P24] Mrs. Flake contends that the 1999 Settlement Agreement, as an oral agreement with testamentary effect, is unenforceable and is subject to *section 75-3-912 of the Utah Code*, which provides as follows:

[HN10] Subject to the rights of creditors and taxing authorities, competent successors may agree among themselves to alter the interests, shares, or amount to which they are entitled under the will of the decedent, or under the laws of intestacy, in any way that they provide in a written contract executed by all who are affected by its provisions. The personal representative shall abide by the terms of the agreement, subject to his obligation to administer the estate for the benefit of creditors, to pay taxes and costs of administration, and to carry out the responsibilities of his office for the benefit of any successors of the decedent who are not parties. Personal representatives of decedents' estates are not required to see to the performance of trusts if the trustee thereof is another person who is willing to accept the trust. Accordingly, trustees of a testamentary trust are successors [\*\*\*24] for the purposes of this section. Nothing contained in this section relieves trustees of any duties owed to beneficiaries of trusts.

*Utah Code Ann. § 75-3-912* (emphasis added). Mrs. Flake argues that the legislative history, official text, and comments, indicate that the Utah Probate Code was designed to establish uniform rules to govern all testamentary documents, including inter vivos trusts, and thus *section 75-3-912* should apply to trusts as well as to wills.

[\*P25] [\*\*598] [HN11] When faced with a question of statutory construction, and in attempting to determine legislative intent, this court first looks to the plain language of the

statute. *State v. Martinez*, 2002 UT 80, P12, 52 P.3d 1276; *Stephens v. Bonneville Travel, Inc.*, 935 P.2d 518, 520 (Utah 1997); *Savage Indus. v. Utah State Tax Comm'n*, 811 P.2d 664, 671 (Utah 1991). In construing a statute, we assume that "each term in the statute was used advisedly; thus the statutory words are read literally, unless such a reading is unreasonably confused or inoperable." *Id.* at 670. "Only if we find some ambiguity [in the statute's plain [\*\*\*25] language] need we look further," *Schurtz v. BMW of N. Am.*, 814 P.2d 1108, 1112 (Utah 1991), and only then "need we seek guidance from the legislative history and relevant policy considerations." *World Peace Movement of Am. v. Newspaper Agency Corp.*, 879 P.2d 253, 259 (Utah 1994).

[\*P26] We turn to the specific language of the statute, which states that "competent successors may agree among themselves to alter the interests, shares, or amount to which they are entitled under the *will* of the decedent, or under the *laws of intestacy*, in any way that they provide in a written contract executed by all who are affected by its provisions." *Utah Code Ann.* § 75-3-912 (emphasis added). Thus, according to the plain language of the statute of the Utah Probate Code, the requirement of a written contract to alter beneficiary interests applies only to interests created by will or by the laws of intestacy. Mrs. Flake suggests that the statute was poorly drafted and that the drafters intended, but failed, to make the necessary revisions to include agreements affecting interests created by trusts. She may be correct, but there [\*\*\*26] is no evidence thereof in the statute. Its plain terms limit the requirement of a written contract in altering beneficiary interests to a will or the laws of intestacy. [HN12] We will not look beyond the language to divine legislative intent; the language is clear and unambiguous. *Stephens*, 935 P.2d at 522 (citing *Brinkerhoff v. Forsyth*, 779 P.2d 685, 686 (Utah 1989)). [HN13] A written agreement is not required to alter interests created by an inter vivos trust.

[\*P27] The issue of whether an oral contract or agreement exists presents questions of both law and fact. "Whether a contract has been formed is ultimately a conclusion of law, but that ordinarily depends on the resolution of subsidiary issues of fact." *Nunley v. Westates Casing Serv., Inc.*, 1999 UT 100 P17, 989 P.2d 1077, 1083 (citing *O'Hara v. Hall*, 628 P.2d 1289, 1290-91 (Utah 1981)). While we do not defer to the trial court's legal conclusions in reviewing them for correctness, we do defer to its factual findings, and will not set them aside unless they are clearly erroneous. *See Reliance Ins. Co. v. Utah Dep't of Transp.*, 858 P.2d 1363, 1366 (Utah 1993). [\*\*\*27] A trial court's finding of fact is not clearly erroneous unless it is against the clear weight of the evidence or we reach a definite and clear conclusion that a mistake has been made. *See Dep't of Human Serv. v. Irizarry*, 945 P.2d 676, 682 (Utah 1997).

[\*P28] The April 14, 1999 meeting resulted in an enforceable oral agreement that was later memorialized by a writing, the 1999 Settlement Agreement. [HN14] The terms and conditions of an oral agreement must be sufficiently definite to allow it to be enforced. *See Brown's Shoe Fit Co. v. Olch*, 955 P.2d 357, 363 (Utah Ct. App. 1998). In determining whether the parties created an enforceable contract, a court should consider all preliminary negotiations, offers, and counteroffers and interpret the various expressions of the parties for the purpose of deciding whether the parties reached agreement on complete and definite terms. *See* 1 Joseph M. Perillo, *Corbin on Contracts* § 2.1, at 101 (rev. ed. 1993). Based on the actions of the parties prior to and after the April 14, 1999 settlement meeting, we conclude that the trial court correctly ruled that the parties entered into an enforceable settlement [\*\*\*28] agreement. The parties were each accompanied by legal representatives at the meeting. The parties agreed to essential terms regarding the life estate, distribution of the Cadillac, payment of outstanding creditors, owner-

ship in the life insurance policies and funeral plan, disposition of the tax proceeds, use and condition of a barn, as well as additional items of personal property. [HN15] "An agreement cannot be enforced if its terms are indefinite or demonstrate [\*\*599] that there was no intent to contract." *Richard Barton Enters. v. Tsern*, 928 P.2d 368, 373 (Utah 1996) (citing *Valcarce v. Bitters*, 12 UT 2d 61, 63, 362 P.2d 427, 428 (Utah 1961)); *Perillo*, *supra* § 4.3 at 569. Here, the agreed terms were specific and definite, and the facts found by the trial court demonstrate an intent by the parties to comply with the terms of the 1999 Settlement Agreement.

#### B. Waiver

[\*P29] Mrs. Flake contends that the 1999 Settlement Agreement was an unexecuted agreement and as such is unenforceable. As we stated in the foregoing section, the 1999 Settlement Agreement was a valid and enforceable oral settlement agreement. Mrs. Flake further contends that [\*\*\*29] the 1987 Trust Agreement and the 1998 Restatement granted certain rights that could only be relinquished through express waiver. [HN16] "Waiver is an intentional relinquishment of a known right. 'It must be distinctly made, although it may be express or implied.'" *Interwest Const. v. Palmer*, 886 P.2d 92, 98 (Utah Ct. App. 1995) (citing *Webb v. R.O.A. Gen., Inc.*, 773 P.2d 834, 839 (Utah Ct. App. 1989)). With respect to waiver, this court has often used the following formulation:

A waiver is the intentional relinquishment of a known right. To constitute a waiver, there must be an existing right, benefit, or advantage, a knowledge of its existence, and an intention to relinquish it. [The relinquishment] must be distinctly made, although it may be express or implied.

*Soter's, Inc. v. Deseret Fed. Sav. & Loan Ass'n*, 857 P.2d 935 (Utah 1993) (citing *Phoenix*

*Inc. v. Heath*, 90 Utah 187, 194, 61 P.2d 308, 311-12 (1936)).

[\*P30] Thus, we have previously stated that a "waiver is an intentional relinquishment of a known right." *Interwest*, 886 P.2d at 98. To constitute a waiver, there must be an existing [\*\*\*30] right, benefit or advantage, a knowledge of its existence, and an intention to relinquish it. Mrs. Flake argues that the waiver "must be distinctly made, although it may be express or implied." *Hunter v. Hunter*, 669 P.2d 430, 432 (Utah 1983) (quoting *Am. Sav. Loan Ass'n v. Bloomquist*, 21 Utah 2d 289, 292, 445 P.2d 1, 3 (1968)). While it is true that a waiver, or the relinquishment of a known right, must be distinctly made, it still may be express or implied. Mrs. Flake relies on language in *Hunter*, 669 P.2d at 432, which sought to elaborate restrictively on what specific facts might be necessary to support a finding of intent. *Hunter* stated that "to constitute waiver, one's actions or conduct must be distinctly made, must evince in some unequivocal manner an intent to waive, and must be inconsistent with any other intent." *Id.* The language in *Hunter*, stating the need for an unequivocal intent to waive a known right, was later addressed by this court. In *Soter's*, 857 P.2d at 942, this court reiterated that the legal standard of *Phoenix* is the correct standard required to establish waiver. "A waiver [\*\*\*31] is the intentional relinquishment of a known right. To constitute waiver, there must be an existing right, benefit or advantage, a knowledge of its existence, and an intention to relinquish it." *Soter's*, 857 P.2d at 942 (citing *Phoenix*, 61 P.2d at 311-12). *Soter's* further clarified that the intent to relinquish a right must be distinct, and this determination is made by looking at the totality of the circumstances. *Soter's*, 857 P.2d at 942. The court noted that in Utah, a distinct intent to waive may only be shown by a preponderance of the evidence. *Id.* at 942, n.6.

[\*P31] [HN17] "Waiver of a contractual right occurs when a party to a contract inten-

tionally acts in a manner inconsistent with its contractual rights, and, as a result, prejudice accrues to the opposing party or parties to the contract." *Interwest Const.*, 886 P.2d at 98; see also *Cooper v. Forresters Underwriters, Inc.*, 2 Utah 2d 373, 376-77, 275 P.2d 675, 677 (1954) (holding defendant did not waive the right to enforce a contract because defendant's actions were not inconsistent with terms of contract nor did defendant [\*\*\*32] induce belief that it did not intend to enforce terms of contract). Here, the evidence shows that the actions of Mrs. Flake were intended to relinquish known rights. She agreed to assign ownership to the trust of the life insurance policy as well as the funeral plan, and acted accordingly. She agreed to close the outstanding credit accounts in compliance [\*\*600] with the Trust's agreement to pay those outstanding debts, and again acted accordingly. Mrs. Flake agreed to and received the distribution of the Cadillac. She agreed to the terms of the life estate as outlined in the 1998 Restatement. When looking to the totality of the circumstances, Mrs. Flake's actions were consistent with the terms of the 1999 Settlement Agreement, and thus her actions satisfy the elements of waiver.

#### IV. LIS PENDENS

[\*P32] The trustee argues on cross-appeal that the trial court erred in failing to award fees and costs resulting from Mrs. Flake's failure to remove a lis pendens from certain trust property. Under *Utah Code Ann. sections 38-9-4 and 38-12-102, 103*, appellee argues that Mrs. Flake filed a lien and failed to provide notice within thirty days after recordation as required [\*\*\*33] under *Utah Code Ann. § 38-12-102*. Appellee argues that this subjects Mrs. Flake to liability of "\$ 1,000 or for treble actual damages," whichever is greater, and for reasonable attorney fees and costs. *Utah Code Ann. section 38-12-103(1)(a)* states that [HN18] "[a] person who fails to meet the notice requirements" is "precluded from receiving an award of costs and attorney's fees from the person against

whom a notice of lien has been filed." However, *Utah Code Ann. section 38-12-103(1)(b)* provides that [HN19] "subsection (1)(a), a person's failure to meet the notice requirements, 'does not create a right to costs and attorneys' fees.'"

[\*P33] Mrs. Flake argued that the lis pendens was recorded to give constructive notice that the property was the subject of litigation. The trial court found that based on Mrs. Flake's withdrawal of her claims of undue influence all lis pendens filed on property in this case should be released. The trial court considered the trustee's argument and declined to award the statutory penalty for failing to give notice. *Utah Code Ann. section 38-12-103(2)* [HN20] provides [\*\*\*34] for penalties to the lien claimant for noncompliance with the notice requirements or for *a willful refusal to release the lien*. After the trial court's finding that all lis pendens should be released, Mrs. Flake filed a Motion for Stay Pending Appeal and Further Order of the Court. The trial court issued its final Order Dissolving Lis Pendens on July 11, 2001. During the pendency of the litigation, the lis pendens did not create any actual damages to the litigants. The lis pendens did not cloud title because, other than an attempt to refinance, there was no attempt to transfer or convey the underlying property. Our review of the record does not indicate that the trial court's finding was clearly erroneous. We agree with the trial court that there was no willful refusal to release the notice of lien, and therefore that Mrs. Flake should not have been ordered to pay damages.

#### CONCLUSION

[\*P34] For the foregoing reasons, we affirm the trial court's ruling granting the motion to dismiss, but reverse as to the enforceability of the original 1987 Trust Agreement. We find that the 1998 Restatement and the 1999 Settlement Agreement govern the disposition of the estate of [\*\*\*35] Almon J. Flake. Accordingly, Mrs. Flake is entitled to the following distribu-

tions: (i) the life estate as outlined in the 1998 Restatement; (ii) the distribution of the Cadillac; (iii) the payment of the commercial debts as outlined in the 1999 Settlement Agreement; (iv) the right to the funeral plan maintained by the trust; and (v) the right to the upper level of the barn as a storage facility. Mrs. Flake is not entitled to monthly support from the trust, nor is she entitled to receive the decedent's social security, according to the 1998 restatement, <sup>4</sup> and retirement funds as outlined in the 1987 Trust Agreement.

4 We are at a loss to understand this particular provision, inasmuch as social security benefits are determined by the Social Security Administration and are not subject to allocation by trust documents.

[\*P35] The trustee contends that the trust is entitled to repayment of the support payments paid through the time of trial and post-trial. In light of our decision, this case is remanded for [\*\*\*36] a determination of the amount of payments, if any, that Mrs. Flake must repay to the trust. See *Capital Transit* [\*\*601] *Co. v. Pub. Util. Comm'n*, 93 U.S. App. D.C. 194, 213 F.2d 176, 195 (D.C. Cir. 1954) (citing *Cox v. Dixie Power Co.*, 81 Utah 94, 16 P.2d 916 (Utah 1932)). [HN21] "The trial court has power to order restitution in an independent suit, or upon a motion filed in the original proceeding[.]" *id.* (citation omitted),

and we believe that the trial court should undertake the disposition of the trustee's claims here, as was observed in *Capital Transit Co.*,

The disposition of a claim for restitution may well involve issues of fact and law, conflicting equities, and problems of legal and administrative policy. These can best be dealt with and disposed of initially by the [trial court]. . . .

213 F.2d 176 at 196. We agree also with the comment that,

In view of the ruling of the Supreme Court in *Atlantic Coast Line R. Co. v. Florida*, *cit. supra* 295 U.S. 301, 79 L. Ed. 1451, 55 S. Ct. 713 (1934) that restitution upon the reversal of a judgment 'is not of mere right. It is ex gratia, resting in the exercise of a sound discretion . . . .'"

[\*\*\*37] *Id.* at 196 (citations omitted). Thus, it is appropriate for the trial court to consider this claim in the first instance.

[\*P36] Associate Chief Justice Durrant, Justice Russon, Justice Wilkins, and Judge Greenwood concur in Chief Justice Durham's opinion.

[\*P37] Having recused himself, Justice Howe does not participate herein; Court of Appeals Judge Pamela T. Greenwood sat.

Tab 5



Cited

As of: Apr 22, 2010

**John E. Hoggan a.k.a. Jack E. Hoggan, Plaintiff, Appellant, and Counterclaim Defendant, v. William E. Hoggan, Trustee; William E. Hoggan; and Bonnie Jilene Weber, Defendants, Appellees, and Counterclaim Plaintiffs.**

**No. 20051104**

**SUPREME COURT OF UTAH**

***2007 UT 78; 169 P.3d 750; 588 Utah Adv. Rep. 24; 2007 Utah LEXIS 183***

**October 5, 2007, Filed  
November 6, 2007, Released**

**PRIOR HISTORY: [\*\*\*1]**

Third District, Salt Lake. No. 020912454.  
The Honorable Glenn Iwasaki.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** The Third District Court, Salt Lake, Utah, ruled that the decedent's amendment to her trust was valid and that appellee trustees were therefore entitled to partial summary judgment on appellant's, another trustee and brother to the trustees, suit to invalidate the amendment. The brother appealed.

**OVERVIEW:** The brother argued that the district court erred in concluding that the 2002 amendment was valid and in entering findings of fact and conclusions of law that exceeded the findings and conclusions articulated in its

initial memorandum decision. The supreme court held that the decedent retained the right to amend the trust amendment where she had reserved the right to amend, modify, or revoke the trust. She could not amend the trust to completely divest one of the beneficiaries of his or her interest without first revoking the trust. The supreme court found that because the brother's interest in the trust was not completely divested but only modified, the amendment did not violate the terms of the trust and was therefore not valid.

**OUTCOME:** The judgment was affirmed.

**CORE TERMS:** beneficiary's, amend, settlor, trust property, summary judgment, modify, revoke, vested interests, trust instrument, beneficial interest, present interest, revocation, terminated, vested, partial, divestment, presently, modified, divested, revoked, contributed, un-



disbursed, articulated, invalidate, contingent, enjoyment, exceeded, reserved, drafters, uphold

### **LexisNexis(R) Headnotes**

*Civil Procedure > Appeals > Standards of Review > De Novo Review*

*Estate, Gift & Trust Law > Trusts > Interpretation*

[HN1] On summary judgment, the Utah Supreme Court reviews the district court's legal conclusions for correctness. So long as a court confines its analysis to the language of the trust instrument and does not resort to extrinsic evidence of intent, the interpretation of a trust is an issue of law.

*Estate, Gift & Trust Law > Trusts > Modification & Termination*

[HN2] Absent fraud or mistake, a settlor has the power to modify a trust only if and to the extent that such a power was reserved by the terms of the trust.

*Estate, Gift & Trust Law > Trusts > Beneficiaries > General Overview*

*Estate, Gift & Trust Law > Trusts > Interpretation*

[HN3] The Utah Supreme Court agrees with the analysis of the Restatement (Third) of Trusts § 25, which advocates the abandonment of confusing and disingenuous terminology in favor of an open recognition that there is no requirement that a beneficiary's interest be either present or vested: Issues are obscured and litigation invited by confusing or unsound dicta often found in opinions that attempt to explain why something is or is not a present trust. Asking whether something is a "trust" or a "mere agency" is at best question begging. So is the suggestion in many opinions that, in order to uphold a disposition, a court must find a "pre-

sent" or "vested" interest in one or more beneficiaries other than the settlor; in fact these statements are untrue unless they mean, simply, "presently existing" interests. And assertions that a settlor must relinquish "dominion and control" over the property are merely erroneous dicta. These statements confuse the issue, and maybe the reader, ignoring the reality that these very courts regularly and properly find valid trusts where settlors have retained complete control, and where the other beneficiaries usually, if drafting is competent, have only future interests that are not only defeasible (by revocation or amendment) but also "contingent" upon surviving the settlor and maybe other events as well.

**COUNSEL:** J. Jay Bullock, Clinton J. Bullock, Karen Bullock Kreeck, Salt Lake City, for plaintiff.

Matthew C. Barneck, Brian C. Webber, Steven W. Call, Salt Lake City, for defendants.

**JUDGES:** PARRISH, Justice. Chief Justice Durham, Justice Durrant, Justice Nehring, and Judge Ludlow concur in Justice Parrish's opinion. Having disqualified himself, Associate Chief Justice Wilkins does not participate herein; District Judge Eric A. Ludlow sat.

**OPINION BY: PARRISH**

**OPINION**

[\*\*751] *PARRISH, Justice:*

**INTRODUCTION**

[\*P1] Shortly before she passed away, Leona Hoggan ("Leona") amended a trust that she had created some fifteen years earlier. The amendment provided that, upon Leona's death, her son John Hoggan (a.k.a. "Jack") would be forgiven a loan Leona made to him, rather than receiving a one-third interest in the trust property. Jack asserts that the language of the trust

document did not authorize Leona to effect such an amendment. We disagree. Under our previous interpretations of very similar trust language in *Banks v. Means*, 2002 UT 65, 52 P.3d 1190, and *Flake v. Flake (In re Estate of Flake)*, 2003 UT 17, 71 P.3d 589, Leona retained the power to modify Jack's interest.

## BACKGROUND

[\*P2] [\*\*\*2] Leona executed the original trust document in 1987. Under the terms of the trust, the trust property was to be used for Leona's benefit during her lifetime. Upon her death, the trust property was to be distributed equally among her three children--Jack, Bonnie Weber ("Bonnie"), and William Hoggan ("William"). Article XI of the trust, entitled "Revocation and Amendment," provides: "As long as the Undersigned is alive, she reserves the right[] to amend, modify, revoke, or remove from this Trust any and all property that she has contributed, in whole or in part, including the principal, and the present or past undisbursed income from such principal." This section also contains the following sentence: "The interest of the beneficiaries is a present interest which shall continue until this Trust is revoked or terminated other than by death."

[\*P3] In 2002, Leona signed an amendment to the trust that modified the allocation of the trust property upon her death. Under the amended distribution scheme, William was to receive an automobile, while the remainder of the trust property was to be either divided between William and Bonnie or transferred to the survivor of the two. As his only share of the [\*\*\*3] trust property, Jack was to be forgiven any remaining indebtedness he owed to Leona at the time of her death. Leona passed away two months after executing the amendment.

[\*P4] Later that same year, Jack filed suit against William and Bonnie individually and against William in his capacity as trustee. The lawsuit sought to invalidate the amendment under various theories. Specifically, Jack asserted

that the amendment was the result of undue influence on the part of William and that Leona suffered from diminished capacity. Jack also sought to invalidate the amendment and reform the trust documents under the theory that the amendment violated the terms of the trust. Jack subsequently filed a motion for partial summary judgment under the latter theory. William and Bonnie then filed cross-motions for partial summary judgment, arguing that the second amendment was valid or, in the alternative, that the terms of the trust should be reformed to reflect Leona's intent.

[\*P5] In a memorandum decision, the district court ruled that the amendment was valid and that William and Bonnie were therefore entitled to partial summary judgment. William and Bonnie then submitted to the district court proposed findings [\*\*\*4] of fact and conclusions of law. Jack objected on the basis that the proposed factual findings and legal conclusions exceeded the scope of the issues addressed in the district court's memorandum decision. The district court overruled Jack's objections and entered an order consistent with William and Bonnie's proposed findings and conclusions.

[\*P6] The parties stipulated that Jack's claims of undue influence and reduced capacity would be dismissed with prejudice so that the partial summary judgment would become final and appealable. Jack now appeals the partial summary judgment.

## STANDARD OF REVIEW

[\*P7] [HN1] "On summary judgment, we review the [district] court's legal conclusions for correctness." *Quaid v. U.S. Healthcare, Inc.*, 2007 UT 27, P 8, 158 P.3d 525. So long as a court confines its analysis to the language of the trust instrument and does not resort to extrinsic evidence of intent, the interpretation of a trust is an issue of law. [\*\*752] See *Kimball v. Campbell*, 699 P.2d 714, 716 (Utah 1985) ("A contract's interpretation may be either a question of law, determined by the words of the

agreement, or a question of fact, determined by extrinsic evidence of intent."). Because we restrict our review in this [\*\*\*5] case to the language of the trust instrument, we cede no deference to the district court.

## ANALYSIS

[\*P8] Jack has raised two challenges to the summary judgment entered by the district court. First, he argues that the district court erred in concluding that the 2002 amendment was valid. Second, he asserts that the court erred when it entered findings of fact and conclusions of law that exceeded the findings and conclusions articulated in its initial memorandum decision.

### I. VALIDITY OF THE 2002 AMENDMENT

[\*P9] [HN2] "Absent fraud or mistake, a settlor 'has the power to modify a trust only if and to the extent that such a power was reserved by the terms of the trust.'" *Flake v. Flake (In re Estate of Flake)*, 2003 UT 17, P 13, 71 P.3d 589 (quoting *Kline v. Utah Dep't of Health*, 776 P.2d 57, 61 (Utah Ct. App. 1989)); accord *Banks v. Means*, 2002 UT 65, P 9, 52 P.3d 1190; *Restatement (Second) of Trusts* § 331 (1959). We accordingly begin by analyzing the terms of the trust to determine whether Leona reserved the right to amend the trust document. Because we find that she did, we then examine the scope of her authority to amend the trust and whether she exceeded any limitations placed upon that power.

[\*P10] Leona retained [\*\*\*6] a broad grant of authority to amend the trust. Article XI of the trust instrument provides: "As long as the Undersigned is alive, she reserves the right[] to amend, modify, revoke, or remove from this Trust any and all property that she has contributed, in whole or in part, including the principal, and the present or past undisbursed income from such principal." Under a literal reading of the trust language, the object of the phrase "to amend, modify, [and] revoke" is the trust prop-

erty, rather than the trust instrument. This reading is nonsensical, however, because one does not typically amend, modify, or revoke property, but rather, written legal documents. In interpreting nearly identical trust language in *Flake*, 2003 UT 17, P 14, 71 P.3d 589,<sup>1</sup> we eschewed this rather odd literal reading and interpreted the language to mean that the settlor had reserved the right to amend, modify, or revoke the trust. Consistent with this precedent, we hold that Leona retained the right to amend the trust instrument.

#### 1 The analogous *Flake* trust language read:

As long as the Undersigned is alive, he reserves the right, without the consent or approval of any other, to amend, modify, revoke, or remove from this Trust [\*\*\*7] the property that he has contributed, in whole or in part, including the principal and the present or past undisbursed income from such principal.

2003 UT 17, P 14, 71 P.3d 589.

[\*P11] Her power to amend the trust, however, was circumscribed. Article XI of the trust also states, "The interest of the beneficiaries is a present interest which shall continue until this Trust is revoked or terminated other than by death."<sup>2</sup> In *Banks*, we [\*\*753] held that very similar trust language<sup>3</sup> required "a complete revocation . . . to divest the beneficiaries of their vested interests." 2002 UT 65, P 12, 52 P.3d 1190. In accordance with this interpretation of the trust language, we invalidated an amendment to the *Banks* trust that completely divested named beneficiaries of their interests. *Id.* PP 15-16. Therefore, under the very similar language of the Hoggan trust,

2007 UT 78, \*, 169 P.3d 750, \*\*;  
588 Utah Adv. Rep. 24; 2007 Utah LEXIS 183, \*\*\*

Leona could not amend the trust to completely divest one of the beneficiaries of his or her interest without first revoking the trust. Jack relies on *Banks* in arguing that the amendment violated the terms of the trust.

2 Language asserting that beneficiaries have a "present interest" or a "presently vested interest" in a trust has apparently become common within trusts drafted in [\*\*\*8] Utah. We suspect that drafters include such language with the intent of warding off potential challenges to the trust on grounds that it is illusory. See *Banks*, 2002 UT 65, PP 12-13, 52 P.3d 1190. Unfortunately, such phrases have been the focus of recent litigation and have the potential to produce results not within the contemplation of the drafters of trusts or their clients. Indeed, the potential for confusion is great because in many living trusts, like the one at issue here, the beneficiaries have no immediate right of possession or enjoyment of the trust property. In such instances, the insertion of language proclaiming that the beneficiaries have a "present interest" simply contradicts the operative terms of the trust. See *Black's Law Dictionary* 816 (7th ed. 1999) (defining a present interest as "[a] property interest in which the privilege of possession or enjoyment is present and not merely future; an interest entitling the holder to immediate possession"). Similarly, trusts in which the settlor retains the right to amend or revoke the instrument do not convey "presently vested rights" to beneficiaries because their interests are contingent upon the settlor not amending or revoking the [\*\*\*9] trust. See *id.* at 1557 (defining the term "vested" as a "consummated right for present or future enjoyment; not contingent; unconditional; absolute").

The impetus for including such phrases within trust agreements appears

to originate, unfortunately, from our holding that a trust is invalid unless the beneficiary's interest vests during the settlor's lifetime. *Alexander v. Zion's Sav. Bank & Trust Co.*, 2 Utah 2d 317, 273 P.2d 173, 174 (Utah 1954), *aff'd on reh'g*, 4 Utah 2d 90, 287 P.2d 665 (Utah 1955). But see *Restatement (Second) of Trusts* § 59 cmt. c (1959) ("A provision in the terms of the trust under which interests of the beneficiaries do not vest until a future time is not invalid unless such interests may not vest within the period of the rule against perpetuities . . ."). In an apparent effort to uphold prior precedent while at the same time avoiding the invalidation of countless trusts intended to serve as substitutes for wills, we later said that such trusts created vested interests that were subject to divestment. *Horn v. First Sec. Bank of Utah, N.A.*, 548 P.2d 1265, 1267 (Utah 1976). Although the term "vested interest subject to divestment" is more of an oxymoron than a meaningful legal term, over [\*\*\*10] the decades this phrase has been used by this court to uphold trusts in which the beneficiaries' interests were not vested under the traditional meaning of the term. See *Banks*, 2002 UT 65, P 13, 52 P.3d 1190; *Groesbeck v. Groesbeck (In re Estate of Groesbeck)*, 935 P.2d 1255, 1257-58 (Utah 1997).

We hereby disavow the use of this phrase and the antiquated and now widely discredited rule articulated in *Alexander* that gave rise to it. [HN3] We agree with the analysis of the Restatement (Third) of Trusts, which advocates the abandonment of such confusing and disingenuous terminology in favor of an open recognition that there is no requirement that a beneficiary's interest be either present or vested:

2007 UT 78, \*; 169 P.3d 750, \*\*;  
588 Utah Adv. Rep. 24; 2007 Utah LEXIS 183, \*\*\*

Issues are obscured and litigation invited by confusing or unsound dicta often found in opinions that attempt to explain why something is or is not a present trust. Asking whether something is a "trust" or a "mere agency" is at best question begging. So is the suggestion in many opinions that, in order to uphold a disposition, a court must find a "present" or "vested" interest in one or more beneficiaries other than the settlor; in fact these statements are untrue unless they mean, simply, "presently existing" [\*\*\*11] interests. And assertions that a settlor must relinquish "dominion and control" over the property are merely erroneous dicta.

These statements confuse the issue, and maybe the reader, ignoring the reality that these very courts regularly and properly find valid trusts where settlors have retained complete control, and where the other beneficiaries usually, if drafting is competent, have only future interests that are not only defeasible (by revocation or amendment) but also "contingent" upon surviving the settlor and maybe other events as well . . . .

*Restatement (Third) of Trusts § 25 reporter's notes, cmt. b* (2003).

3 The analogous *Banks* trust language read: "The interests of the beneficiaries

are presently vested interests subject to divestment which shall continue until this Trust is revoked or terminated other than by death." 2002 UT 65, P 4, 52 P.3d 1190.

[\*P12] Jack's reliance is misplaced in light of our subsequent decision in *Flake*. We clarified in *Flake* that such trust language invalidates only amendments that effect a complete divestment of an interest in the trust. In interpreting trust language very similar to that in *Banks* and nearly identical to the language found in the Hoggan trust, ' we [\*\*\*12] held:

The beneficial interest of Mrs. Flake was merely amended, and not completely divested as was the case in *Banks*. The dispositive issue in the present case is whether there was a complete divestiture of a beneficial interest as in *Banks*, or whether there was simply a change in the quality, or scope, of the beneficial interest. We held in *Banks* that revocation was required when terminating a vested beneficial interest. Here, we find that there is no requirement of revocation where the beneficial interest is simply modified or amended but not terminated.

*Flake*, 2003 UT 17, P 17, 71 P.3d 589 (citation omitted).

4 The analogous *Flake* trust language read: "The interest of the beneficiaries is a present vested interest which shall continue until the Trust is revoked or terminated other than by death." 2003 UT 17, P 17, 71 P.3d 589.

[\*\*754] [\*P13] Under the clear precedent of *Banks* and *Flake*, if the 2002 amendment completely divested Jack of any interest in the

trust, the amendment would violate a condition placed upon the power to amend because Leona failed to revoke the trust first. If the amendment merely changed the quality or scope of Jack's beneficial interest, however, it would be valid. The amendment changed Jack's interest [\*\*\*13] in the trust from an equal share in the trust property to forgiveness of any remaining indebtedness to Leona at the time of her death. Jack does not contest that he still owed his debt to Leona at the time of her death and that the forgiveness of this legal obligation to pay the debt is a benefit conferred upon him under the amendment. Because Jack's interest in the trust was not completely divested but only modified, the amendment does not violate the terms of the trust and is therefore valid.

[\*P14] Jack argues that we should overrule *Flake* because the holding in that case would allow settlors to effectively eliminate a beneficiary's interest in a trust by merely modifying that interest to a negligible amount. We decline such an invitation. First, Jack does not assert that the benefit he received from the trust was nominal. Therefore, his argument applies only to hypothetical future cases and would not be dispositive in this case. Second, the potential outcome that Jack finds objectionable is under the control of the drafters of trust instruments. If a settlor deems such an outcome to be unpalatable, it can easily be avoided through careful drafting.

## II. FINDINGS AND CONCLUSIONS OF THE DISTRICT [\*\*\*14] COURT

[\*P15] Jack also argues that the district court erred in adopting findings of fact and conclusions of law that were not articulated in its original memorandum decision. He primarily asserts that the additional findings of fact relating to Leona's state of mind and her intent in including certain provisions of the trust were improper and that we should therefore refuse to consider these additional findings. We need not address the merits of this argument because the findings to which Jack objects are unnecessary to our holding. The only facts necessary to our holding are the terms of the trust and the undisputed existence of Leona's outstanding loan to Jack. The additional findings and conclusions to which Jack objects are simply irrelevant.

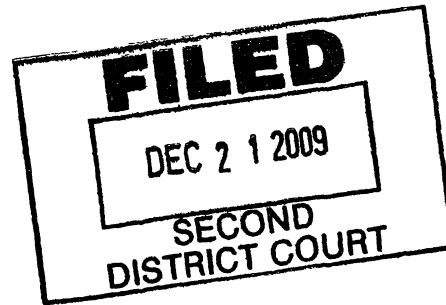
## CONCLUSION

[\*P16] Because the 2002 amendment merely modified Jack's interest in Leona's trust, the amendment is valid, and we therefore affirm the summary judgment entered by the district court.

[\*P17] Chief Justice Durham, Justice Durrant, Justice Nehring, and Judge Ludlow concur in Justice Parrish's opinion.

[\*P18] Having disqualified himself, Associate Chief Justice Wilkins does not participate herein; District Judge Eric A. Ludlow sat.

**Tab B**



L. Miles LeBaron (#8982)  
Brian P. Duncan (#11487)  
Jacob D. Briggs (#12041)  
LEBARON & JENSEN, P.C.  
476 West Heritage Park Blvd., Ste 200  
Layton, Utah 84041  
Telephone: 801-773-9488  
Facsimile: 801-773-9489

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IN THE SECOND JUDICIAL DISTRICT COURT  
DAVIS COUNTY, STATE OF UTAH, FARMINGTON DEPARTMENT

---

Ron Patterson,  
  
Plaintiff,

vs.

Judy Ann Henry and Randy D.  
Patterson, as Trustees of the  
Darlene Patterson Family  
Protection Trust; Estate of  
Darlene Patterson, et al.

Defendants.

ORDER GRANTING  
PLAINTIFF'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT

AND DENYING DEFENDANTS'  
COUNTER MOTION FOR  
PARTIAL SUMMARY JUDGMENT

Civil No. 070700586

Honorable Judge Allphin

---

The Court held a hearing on September 30, 2009 on several motions and has ruled on the following Motions:

Plaintiff's motion for partial summary judgment and Defendants' counter motion for partial summary judgment.

Plaintiff's motion for partial summary judgment sought declaratory relief, asking the Court to hold that a certain "Final Amendment" executed by the Parties' mother on May 30, 2006 is void as a matter of law due to its

633

Order Granting Plaintiff's Motion For Partial Summary Ju



VD30503565

pages: 3



complete divestment of the plaintiff's vested interest in the trust's property without a revocation of the original Family Trust, as is required by the Family Trust's terms. Defendants' counter motion for partial summary judgment sought a declaration that the Final Amendment is valid. The parties reserved any issues regarding whether "undue influence" affected the execution of any of the respective trust documents.

Having read the pleadings, heard the argument of counsel, and being apprised in the premises, the Court hereby orders the following:

1. Plaintiff's Motion for Partial Summary Judgment is granted.
2. Defendants' Motion for Partial Summary Judgment is denied.

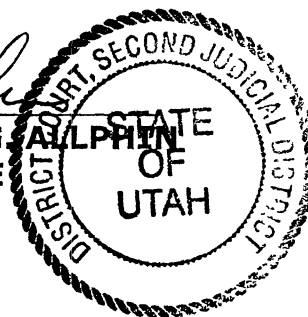
The Final Amendment is invalid and the assets of the estate shall be distributed without regard to any provision contained in the Final Amendment.

Provided, however, that this Order is without prejudice to the Parties' ability to raise the issue of whether undue influence affected the execution of any of the respective trust documents.

IT IS HEREBY, ORDERED AND ADJUDGED, this the 18<sup>th</sup> day of Dec 2009.

**BY THE COURT:**

  
HONORABLE MICHAEL G. ALPHIN  
DISTRICT COURT JUDGE



**Approved as to Form:**

\_\_\_\_\_  
Craig T. Peterson  
Attorney for Defendants

\_\_\_\_\_  
James C. Jenkins  
Attorney for Defendant

**CERTIFICATE OF MAILING**

I hereby certify that I mailed a true and correct copy of the foregoing,  
postage pre-paid to the following:

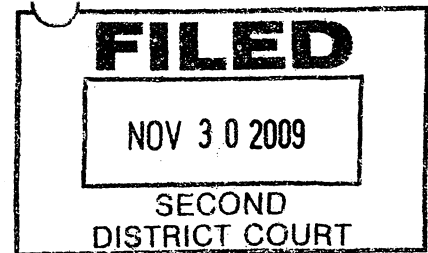
Craig T. Peterson  
Cathcart & Peterson, LLC  
80 North Main Street  
Bountiful, Utah 84010

James C. Jenkins  
Olson & Hoggan, P.C.  
130 South Main St., Suite 200  
P.O. Box 525  
Logan, Utah 84323-0525

on this 3rd day of December 2009.

Janet Palmer

Tab C



IN THE SECOND DISTRICT COURT, DAVIS COUNTY  
STATE OF UTAH

RON PATTERSON,

Plaintiff,

vs.

JUDY ANN HENRY and RANDY D.  
PATTERSON, as trustees of the Darlene  
Patterson Family Protection Trust; ESTATE  
OF DARLENE PATTERSON; JUDY ANN  
HENRY; RANDY D. PATTERSON; GARY  
E. PATTERSON; REX A. PATTERSON;  
VICKY D. ROMERO; RICKY A.  
PATTERSON; and/or JOHN DOES 1-10 and  
JANE DOES 1-10,

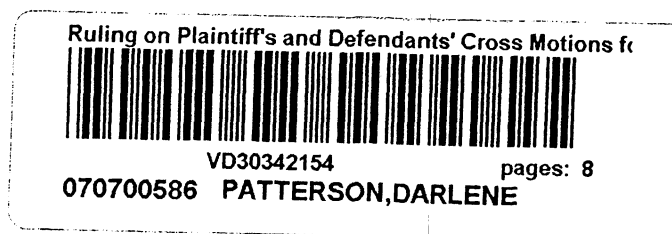
Defendants.

**RULING ON PLAINTIFF'S AND  
DEFENDANTS' CROSS MOTIONS FOR  
PARTIAL SUMMARY JUDGMENT**

Case No. 070700586

Judge Michael G. Allphin

This matter is before the Court on the plaintiff's and the defendants' cross motions for partial summary judgment. The Court has reviewed the moving and responding papers, along with their supporting documentation. The Court also held a hearing on the matters on September 30, 2009. Having considered all of the arguments, being fully advised in the premises, and for the reasons set forth herein, the Court GRANTS the plaintiff's motion for partial summary judgment, and DENIES the defendants' counter motion for partial summary judgment.



## BACKGROUND

The following are the undisputed material facts relevant to the parties' cross motions for summary judgment:<sup>1</sup>

On July 30, 1999, Darlene Patterson and Rex E. Patterson executed, and thus, created The Darlene Patterson Family Protection Trust (herein, the "Family Trust") *See* Family Trust. The stated purpose of the Family Trust is "for the primary benefit of the Undersigned during the Undersigned's lifetime, [and] for the Undersigned's family thereafter." *Id.* at Art. I, § 1.1. Moreover, the Family Trust provides that, "[t]he interests of the beneficiaries are presently vested interests subject to divestment which shall continue until this Trust is revoked or terminated other than by death." *Id.* at Art. III, § 3.2.<sup>2</sup> Further, the Family Trust states that upon the death of Darlene Patterson and Rex. E. Patterson and, "[a]fter all the surviving children of the Undersigned attain age 25, the Trustee shall divide the remaining principal and income of the Trust Estate into as many equal shares as there are children of the Undersigned then living[.]" *Id.* at Art. V, § 5.2. However, the Family Trust also provides that, "[a]s long as the Undersigned is alive, the Undersigned reserves the right to amend, modify or revoke this Trust in whole or in part, including the principal, and the present or past undisbursed income from such principal." *Id.* at Art. III, § 3.1.

On May 31, 2000, Darlene Patterson executed an amendment to the Family Trust (herein, the "First Amendment"), which provided Plaintiff Ron Patterson additional property upon the distribution of the trust's property. *See* First Amendment, ¶1.

---

<sup>1</sup> The Court notes that the parties have agreed and stipulated that the parties' cross motions for partial summary judgment shall be submitted and considered without respect to the parties' respective dispute of facts over the issue of "undue influence" in the execution of the amendments and restatement to the Family Trust by Darlene Patterson prior to her death.

<sup>2</sup> Notably, the Family Trusts lists Plaintiff Ron Patterson among the trust's beneficiaries with a presently vested interest subject to divestment. *See* Family Trust, Art. I, § 1.2.

Subsequently, on March 12, 2001, Darlene Patterson executed a restatement of the Family Trust (herein, the “Restatement”), which, among other things, provided Plaintiff Ron Patterson with an additional specific devise and reduced the beneficiary interests of Defendants Gary E. Patterson, Judy Ann Henry, and Rex A. Patterson. *See* Restatement, Art. IX. Additionally, the Restatement included similar provisions regarding the Family Trust’s revocability and the presently vested interests of the trust’s beneficiaries. *Id.* at Art. II & V, § B.

Thereafter, on May 30, 2006, Darlene Patterson executed another amendment to the Family Trust (herein, the “Final Amendment”), which effectively removed Plaintiff Ron Patterson as a beneficiary of the trust, stating:

“I have intentionally not provided anything for my son Ronald S. Patterson (or his descendants) since I have already properly provided for this son during his lifetime as I felt was appropriate.”

Final Amendment, ¶C.

Darlene Patterson died on April 30, 2007.

On October 25, 2007, the plaintiff initiated this action, which pertains primarily to the parties’ dispute over the distribution of the Family Trust’s property and the propriety of the trust’s amendments and restatement executed by Darlene Patterson prior to her death.

On April 6, 2009, the plaintiff filed the instant motion for partial summary judgment, requesting a declaratory order that the Final Amendment to the Family Trust be invalidated due to its complete divestment of the plaintiff’s vested interest in the trust’s property without a revocation of the Family Trust, as is required by the Family Trust’s terms. The defendants opposed the plaintiff’s motion and filed the instant counter motion for partial summary judgment

on May 5, 2009, requesting the Court disregard prior Utah appellate case law based on the equities of this matter.<sup>3</sup>

Following complete briefing of the parties' cross motions for partial summary judgment and the same being submitted for decision on July 29, 2009, the Court held a hearing on the matters on September 30, 2009, and took the matters under advisement.<sup>4</sup> Accordingly, the Court finds that the parties' cross motions for partial summary judgment are now ripe for determination.

### ANALYSIS

Summary judgment is appropriate only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c). Further, "[o]n a motion for summary judgment a trial court should not weigh disputed evidence, and its sole inquiry should be whether material issues of fact exist" to determine if judgment may be rendered as a matter of law. *Draper City v. Estate of Bernardo*, 888 P.2d 1097, 1100 (Utah 1995).

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<sup>3</sup> The Court notes that on May 29, 2009, the plaintiff filed a motion to strike portions of the Affidavit of Randy Patterson, which the defendants submitted in support of their counter motion for partial summary judgment. The plaintiff argued that certain paragraphs within the affidavit are not based on Randy Patterson's personal knowledge and have no foundation, and regardless, are irrelevant to the issues before the Court. The defendants subsequently amended the affidavit on July 1, 2009, removing many of the disputed statements. On July 29, 2009, the plaintiff submitted his motion to strike for decision. In reviewing the Supplemental and Corrected Affidavit of Randy Patterson, and given the parties' stipulation to limit the issues pertaining to their cross motions for partial summary judgment and the relevant Utah appellate case law on such issues, the Court agrees with the plaintiff that the information within the affidavit is largely irrelevant to the Court's analysis. However, the Court finds that the plaintiff's motion to strike is rendered moot by the Court's ruling on the plaintiff's motion for partial summary judgment.

<sup>4</sup> The Court notes that also pending at the September 30, 2009 hearing were the plaintiff's motion to strike pleadings and enter default judgment regarding the defendants' failure to provide discovery, and the defendants' motion for Rule 56(f) relief. However, at the hearing, the plaintiff's counsel agreed to provide the defendants with an additional ten (10) days to provide the requested discovery, which timely occurred on October 9, 2009. Further, the defendants' counsel indicated at the hearing that given the parties stipulation to the limitation of issues with regard to the parties' cross motions for partial summary judgment, the defendants' motion for Rule 56(f) relief is unnecessary and moot. Accordingly, the Court finds that both the plaintiff's motion to strike pleadings and the defendants' motion for Rule 56(f) relief are moot.

In the instant matter, the Court is asked to determine the validity of the Family Trust's Final Amendment, which by its terms completely divested the plaintiff's beneficiary interest in the Family Trust without revoking the same, as is required by the Family Trust's terms. "So long as a court confines its analysis to the language of the trust instrument and does not resort to extrinsic evidence of intent, the interpretation of a trust is an issue of law." *Hoggan v. Hoggan*, 169 P.3d 750, 751 (Utah 2007).<sup>5</sup>

"It is well settled that a trust is a form of ownership in which the legal title to property is vested in a trustee, who has equitable duties to hold and manage it for the benefit of the beneficiaries." *Banks*, 52 P.3d at 1192 (Internal quotations omitted). "Once the settlor has created the trust he is no longer the owner of the trust property and *has only such ability to deal with it as is expressly reserved to him in the trust instrument.*" *Id.* (Emphasis added). "Thus, a settlor has the power to modify or revoke a trust only if and to the extent that such power is explicitly reserved by the terms of the trust." *Id.*; *see also Flake*, 71 P.3d at 594 ("Likewise, if the settlor reserves a power to modify the trust only in a particular manner or under particular circumstances, he can modify the trust only in that manner or under those circumstances.") (Internal quotations omitted); *Hoggan*, 169 P.3d 750, 752 (Utah 2007) ("Absent fraud or mistake, a settlor has the power to modify a trust only if and to the extent that such a power was reserved by the terms of the trust.") (Internal quotations omitted). Accordingly, "[t]he transfer of property interests to the beneficiaries cannot be taken from them except in accordance with a provision of the trust instrument[.]" *Flake*, 71 P.3d at 594.

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<sup>5</sup> The Court notes that the defendants' inclusion of additional facts pertaining to Darlene Patterson's intent and the equity of a finding that the Final Amendment is invalid are largely irrelevant to the Court's analysis of the issues under existing Utah appellate case law and the Court's interpretation of the Family Trust's plain language. *See Banks v. Means*, 52 P.3d 1190 (Utah 2002); *see also Flake v. Flake*, 71 P.3d 589 (Utah 2003); *Hoggan*, 169 P.3d 750. While the defendants have requested the Court disregard this case law as bad precedent, the Court declines such request. This Court is bound to follow the precedent of the Utah appellate courts and the defendants' attempt to change this precedent is more appropriate on appeal.



In the instant matter, the parties acknowledge that the Utah Supreme Court has interpreted trust language, identical in relevant part, to that of the Family Trust's modification and revocation requirements regarding the trust's beneficiaries' presently vested interest in the trust's property. In *Banks v. Means*, the Utah Supreme Court held that an attempted amendment that completely divested a beneficiary's vested interest in a trust's property was invalid due to the settlor's failure to make the amendment in accordance with the trust's terms. 52 P.3d 1190. The *Banks* Court stated that, "[b]y the plain language of the trust, the beneficiaries have 'vested interests' that continue until the interests are 'revoked or terminated.'" *Id.* at 1193. However, the *Banks* Court also found that "[the settlor] reserved the power to revoke, modify, or amend the trust in whole or in part ..., but limited that power ... with regard to the beneficiaries." *Id.* "Thus, a complete revocation [of the trust] was required to divest the beneficiaries of their vested interests." *Id.* In reaching this decision, the *Banks* Court emphasized that, "as we have previously stated, 'even a revocable trust clothes beneficiaries ... with a legally enforceable right to insist that the terms of the trust be adhered to.'" *Id.* at 1194 (quoting *Continental Bank & Trust Co. v. Country Club Mobile Estates, Ltd.*, 632 P.2d 869, 872 (Utah 1981)).

Here, just as in *Banks*, the Family Trust, as amended by the First Amendment and the Restatement, permitted Darlene Patterson to modify and/or revoke the trust, but limited this power by stating that "the interests of the beneficiaries are presently vested interests subject to divestment which shall continue until this Trust is revoked or terminated other than by death." Family Trust, Art III, § 3.2; *see also* Restatement, Art. V, § B ("The interest of the beneficiaries is a present interest which shall continue until this Trust is revoked or terminated.")<sup>6</sup> With

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<sup>6</sup> The Court notes that in *Hoggan v. Hoggan*, the Utah Supreme Court criticized the use of terms such as "vested interest subject to divestment" within trusts due to the confusion and unintended consequences that may occur from the use of such language. 169 P.3d at 753 fn.2. However, the *Hoggan* Court explicitly upheld its prior precedent of

respect to the Final Amendment to the Family Trust, Darlene Patterson attempted to completely divest the plaintiff of his beneficiary interest in the trust's property, to wit:

"I have intentionally not provided anything for my son Ronald S. Patterson (or his descendants) since I have already properly provided for this son during his lifetime as I felt was appropriate."

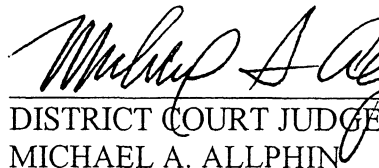
Final Amendment, ¶C. However, the Final Amendment clearly did not revoke the Family Trust or the Restatement, as is required by the documents' plain language to effectuate a complete divestment. Consequently, and in accord with the Utah Supreme Court's precedent in *Banks*, 52 P.3d 1190, *Flake*, 71 P.3d 589, and *Hoggan*, 169 P.3d 750, the Court must find that the Final Amendment is invalid based upon Darlene Patterson's failure to comply with the Family Trust's and the Restatement's terms for completely divesting a beneficiary's vested interest in the trust's property. The Court must, therefore, GRANT the plaintiff's motion for partial summary judgment, and DENY the defendants' counter motion for partial summary judgment.

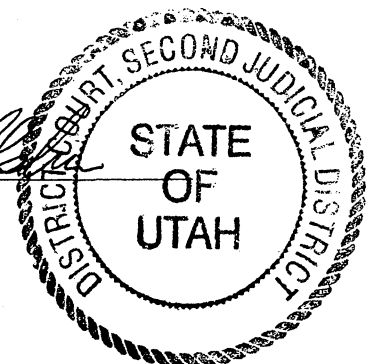
### CONCLUSION

Based on the foregoing, the Court GRANTS the plaintiff's motion for partial summary judgment, and DENIES the defendants' counter motion for partial summary judgment.

Consistent herewith, the Court finds that the plaintiff's motion to strike portions of the Affidavit of Randy Patterson is moot. The Court directs the plaintiff to prepare and submit an order that is consistent with and reflects this Ruling.

Date signed: 11-30-09

  
DISTRICT COURT JUDGE  
MICHAEL A. ALLPHIN



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*Banks*, 52 P.3d 1190, and *Flake*, 71 P.3d 589, asserting that "[i]f a settlor deems such an outcome to be unpalatable, it can easily be avoided through careful drafting." *Id.* at 754.

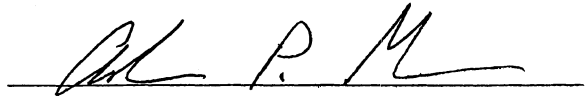
**MAILING CERTIFICATE**

I certify that I sent a true and correct copy of the foregoing **RULING ON**  
**PLAINTIFF'S AND DEFENDANTS' CROSS MOTIONS FOR PARTIAL SUMMARY**  
**JUDGMENT** postage pre-paid, to the following on this date: 11/30/09.

Craig T. Peterson  
CATHCART & PETERSON, LLC  
80 North Main Street  
Bountiful, Utah 84010

L. Miles LeBaron  
LEBARON & JENSEN, PC  
476 West Heritage Park Blvd., Suite 200  
Layton, Utah 84041

James C. Jenkins  
OLSEN & HOGGAN, PC  
P.O. Box 525  
Logan, Utah 84323-0525



## Tab D

SECOND DISTRICT COURT - OGDEN  
WEBER COUNTY, STATE OF UTAH

STATE OF UTAH vs. RONALD STEVEN PATTERSON

CASE NUMBER 061903836 State Felony

CHARGES

Charge 1 - 76-5-111.1(4A) - ATTEMPTED EXPLOITATION OF DISABLD  
OR ELDER ADLT 2nd Degree Felony (amended) to 3rd Degree Felony  
Offense Date: January 19, 2006  
Plea: February 22, 2007 Guilty  
Disposition: February 22, 2007 Guilty

CURRENT ASSIGNED JUDGE  
MICHAEL DIREDA

PARTIES

Defendant - RONALD STEVEN PATTERSON

Plaintiff - STATE OF UTAH

DEFENDANT INFORMATION

Defendant Name: RONALD STEVEN PATTERSON  
Offense tracking number: 14800775  
Date of Birth: June 03, 1957  
Law Enforcement Agency: OGDEN CITY POLICE  
Prosecuting Agency: WEBER COUNTY

ACCOUNT SUMMARY

TOTAL REVENUE	Amount Due:	0.75
	Amount Paid:	0.75
	Credit:	0.00
	Balance:	0.00

PAPER BOND TOTALS	Posted:	10,000.00
	Forfeited:	0.00
	Exonerated:	10,000.00
	Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

	Amount Due:	0.75
	Amount Paid:	0.75
	Amount Credit:	0.00
	Balance:	0.00

---

NONMONETARY BOND DETAIL - TYPE: Surety  
Posted By: BEEHIVE BAIL BONDS  
Posted: 10,000.00  
Forfeited: 0.00  
Exonerated: 10,000.00  
Balance: 0.00

CASE NOTE

APP PROBATION

PROCEEDINGS

09-27-06 Judge PARLEY R BALDWIN assigned.  
09-27-06 Warrant ordered on: September 27, 2006 Warrant Num: 981083438  
Bail Allowed  
Bail amount: 10000.00  
09-27-06 Warrant issued on: September 27, 2006 Warrant Num: 981083438  
Bail Allowed  
Bail amount: 10000.00  
Judge: ROGER S DUTSON  
Issue reason: Based on Affidavit and Order for Warrant of Arrest  
09-27-06 Note: Michael Murphy enters his appearance of counsel.  
09-27-06 Note: Undertaking of bail by Beehive Bail Bonds \$10,000.00 to WCJ 9-22-2006.  
09-27-06 Bond Account created Total Due: 10000.00  
09-27-06 Bond Posted Non-Monetary Bond: 10,000.00  
09-27-06 Case filed  
09-27-06 Filed: From an Information  
09-27-06 Filed: Information  
09-28-06 INITIAL APPEARANCE scheduled on October 19, 2006 at 09:00 AM in 3rd Floor Southwest with Judge BALDWIN.  
09-28-06 Warrant recalled on: September 28, 2006 Warrant num: 981083438  
Recall reason: Based on Court order  
09-28-06 Filed: NOTICE OF APPEARANCE FOR MICHAEL MURPHY FOR DEF  
09-28-06 Filed: Motion AND REQUEST FOR DISCOVERY  
10-02-06 Filed: AMENDED NOTICE OF APPEARANCE FOR MURPHY FOR DEFENDANT  
10-02-06 Filed: AMENDED MOTION AND FOR DISCOVERY REQUEST  
10-19-06 PRELIMINARY HEARING scheduled on November 30, 2006 at 09:00 AM in 3rd Floor Southwest with Judge BALDWIN.  
10-19-06 Minute Entry - Minutes for Initial Appearance  
Judge: PARLEY R. BALDWIN  
PRESENT  
Clerk: debbieg  
Prosecutor: NEIDER, CAMILLE L  
Defendant  
Defendant's Attorney(s): MURPHY, MICHAEL D

#### INITIAL APPEARANCE

A copy of the Information is given to the defendant.  
The Information is read.  
Advised of charges and penalties.  
Defendant is present with private counsel, Michael Murphy.  
Preliminary hearing is requested and set for 11/30/06.  
PRELIMINARY HEARING is scheduled.

Date: 11/30/2006

Time: 09:00 a.m.

Location: 3rd Floor Southwest  
Second District Court  
2525 Grant Avenue  
Ogden, UT 84401

Before Judge: PARLEY R. BALDWIN

11-30-06 PRE-TRIAL CONFERENCE scheduled on December 28, 2006 at 09:00 AM  
in 3rd Floor Southwest with Judge BALDWIN.

11-30-06 Minute Entry - Minutes for PRELIMINARY HEARING

Judge: PARLEY R. BALDWIN

PRESENT

Clerk: debbieg

Prosecutor: NEIDER, CAMILLE L

Defendant

Defendant's Attorney(s): MURPHY, MICHAEL D

Video

Tape Number: PRB113006 Tape Count: 10:18-10:19

#### HEARING

This is time set for preliminary hearing. Defendant is present and  
is represented by Michael Murphy, private counsel.

The defendant waives his preliminary hearing, and the Court  
accepts the waiver. The Court arraigns the defendant on the  
information and holds him for trial.

#### ARRAIGNMENT

A copy of the information is given to the defendant.  
Advised of rights and penalties.  
The information is read.

Defendant enters a plea of not guilty to the charge. Court sets a  
pre-trial on 12/28/06 @ 9:00 a.m.

PRE-TRIAL CONFERENCE is scheduled.

Date: 12/28/2006

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Time: 09:00 a.m.

Location: 3rd Floor Southwest  
Second District Court  
2525 Grant Avenue  
Ogden, UT 84401

Before Judge: PARLEY R. BALDWIN

11-30-06 Charge 1 Plea is Not Guilty  
12-28-06 PRE-TRIAL CONFERENCE scheduled on February 01, 2007 at 09:00 AM  
in 3rd Floor Southwest with Judge BALDWIN.  
12-28-06 JURY TRIAL scheduled on February 27, 2007 at 09:00 AM in 3rd  
Floor Southwest with Judge BALDWIN.  
12-28-06 JURY TRIAL scheduled on February 28, 2007 at 09:00 AM in 3rd  
Floor Southwest with Judge BALDWIN.  
12-28-06 Minute Entry - Minutes for PRE-TRIAL CONFERENCE  
Judge: PARLEY R. BALDWIN  
PRESENT  
Clerk: debbieg  
Prosecutor: DECARIA, MARK R  
Defendant  
Defendant's Attorney(s): MURPHY, MICHAEL D

Video

Tape Number: PRB122806 Tape Count: 9:45-9:46

HEARING

This is time set for pre-trial conference. Defendant is present  
and is represented by Michael Murphy, private counsel.  
Jury trial is requested and set for 2/27 and 2/28/07 @ 9:00 a.m.  
Pre-trial is requested and set for 2/1/07.  
PRE-TRIAL CONFERENCE is scheduled.

Date: 02/01/2007

Time: 09:00 a.m.

Location: 3rd Floor Southwest  
Second District Court  
2525 Grant Avenue  
Ogden, UT 84401

Before Judge: PARLEY R. BALDWIN

JURY TRIAL.

Date: 02/27/2007

Time: 09:00 a.m.

Location: 3rd Floor Southwest  
Second District Court  
2525 Grant Avenue  
Ogden, UT 84401

Before Judge: PARLEY R. BALDWIN

JURY TRIAL.

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Date: 02/28/2007

Time: 09:00 a.m.

Location: 3rd Floor Southwest  
Second District Court  
2525 Grant Avenue  
Ogden, UT 84401

Before Judge: PARLEY R. BALDWIN

02-01-07 DISPOSITION scheduled on February 22, 2007 at 09:00 AM in 3rd  
Floor Southwest with Judge BALDWIN.

02-01-07 Minute Entry - Minutes for PRE-TRIAL CONFERENCE



Judge: PARLEY R BALDWIN  
 PRESENT  
 Clerk: debbieg  
 Prosecutor: HEWARD, GARY R  
 Defendant  
 Defendant's Attorney(s): MURPHY, MICHAEL D

Video  
 Tape Number: PRB020107 Tape Count: 9:16-9:17

HEARING

This is time set for pre-trial conference. Defendant is present and is represented by Michael Murphy, private counsel.

Mr. Murphy makes a motion to strike the trial date and continue this case for the defendant to enter a plea of guilty. Court grants the request.

DISPOSITION is scheduled.

Date: 02/22/2007

Time: 09:00 a.m.

Location: 3rd Floor Southwest  
 Second District Court  
 2525 Grant Avenue  
 Ogden, UT 84401

Before Judge: PARLEY R BALDWIN

02-01-07 JURY TRIAL Cancelled.

02-22-07 Filed order: Statement of Defendant in Support of Guilty Plea and Certificate of Counsel and Order

Judge PARLEY R BALDWIN

Signed February 22, 2007

02-22-07 APP SENTENCING scheduled on April 05, 2007 at 09:00 AM in 3rd Floor Southwest with Judge BALDWIN.

02-22-07 Minute Entry - Minutes for DISPOSITION

Judge: PARLEY R BALDWIN

PRESENT

Clerk: debbieg

Prosecutor: DECARIA, MARK R

Defendant

Defendant's Attorney(s): MURPHY, MICHAEL D

Printed: 04/22/10 15:58:58 Page 5

CASE NUMBER 061903836 State Felony

Video  
 Tape Number: PRB022207 Tape Count: 9:41-9:46

HEARING

This is time set for disposition. Defendant is present and is represented by Michael Murphy, private counsel.

State makes a motion to amend the charge to Attempted Exploitation of Disabled or Elder Adult, a third degree felony. Court grants the motion.

The Court relies on the Statement of Defendant in Support of Guilty Plea and Certificate of Counsel to supplement a Rule 11 colloquy. Plea agreement executed in open court.

Defendant enters a plea of guilty to the amended charge of Attempted Exploitation of Disabled or Elder Adult, a class third degree felony.

Pre-sentence is requested with sentencing continued to 4/5/07. APP SENTENCING is scheduled.

Date: 04/05/2007

Time: 09:00 a.m.

Location: 3rd Floor Southwest  
Second District Court  
2525 Grant Avenue  
Ogden, UT 84401

Before Judge: PARLEY R BALDWIN

02-22-07 Charge 1 Disposition is Guilty

02-22-07 Charge 1 amended to 3rd Degree Felony

04-05-07 Minute Entry - Minutes for APP SENTENCING

Judge: PARLEY R BALDWIN

PRESENT

Clerk: debbieg

Prosecutor: DECARIA, MARK R

Defendant

Defendant's Attorney(s): MURPHY, MICHAEL D

Video

Tape Number: PRB040507 Tape Count: 10:16-10:34

HEARING

This is time set for sentencing. Defendant is present and is represented by Michael Murphy, private counsel. Court proceeds with sentencing.

SENTENCE PRISON

Based on the defendant's conviction of ATTEMPTED EXPLOITATION OF DISABLD OR ELDER ADLT a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in

Printed: 04/22/10 15:58:59

Page 6

CASE NUMBER 061903836 State Felony

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the Utah State Prison.

The prison term is suspended.

SENTENCE JAIL

Based on the defendant's conviction of ATTEMPTED EXPLOITATION OF DISABLD OR ELDER ADLT a 3rd Degree Felony, the defendant is sentenced to a term of 45 day(s)

ORDER OF PROBATION

The defendant is placed on probation for 3 year(s).

Probation is to be supervised by Adult Probation and Parole.

Defendant to serve 45 day(s) jail.

PROBATION CONDITIONS

The defendant shall enter into an agreement with the Utah State Department of Adult Probation & Parole and comply strictly with its terms and conditions.

The defendant shall report to the Department of Corrections and to the court whenever required.

The defendant shall violate no law, either federal, state or municipal.

The defendant shall not consume alcohol or illegal drugs.

The defendant shall submit to random search, seizure, and chemical testing.

The defendant shall not frequent establishments where alcohol is the chief menu item nor associate with persons using alcohol or illegal drugs.

The defendant shall provide a DNA sample, to be obtained by Adult Probation and Parole, and pay all costs.

The defendant shall serve 45 days in the Weber County Jail with credit for time served granted.

The defendant shall report to the Weber County Jail on 4/9/07 @ 8:00 a.m. and may be released to the Kiesel facility for employment.

The defendant shall not have a power of attorney while on probation.

The defendant shall complete any treatment deemed necessary under the direction of Adult Probation and Parole.

The defendant shall pay restitution in the amount of \$52,935.00 on behalf of the victim, Darlene Patterson, payable through Adult Probation and Parole.

04-05-07 Bond Exonerated -10,000.00

04-09-07 Judgment #1 Entered \$ 52935.00

Creditor: DARLENE PATTERSON

Debtor: RONALD STEVEN PATTERSON

52,935.00 Restitution

52,935.00 Judgment Grand Total

04-09-07 Filed judgment: Sentence, Judgment, Commitment

Printed: 04/22/10 15:58:59

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CASE NUMBER 061903836 State Felony

Judge PARLEY R BALDWIN

Signed April 05, 2007

10-18-07 Fee Account created Total Due: 0.75

10-18-07 COPY FEE Payment Received: 0.75

Note: 1.00 cash tendered. 0.25 change given.

03-16-09 APP MOTION TO TERMINATE scheduled on March 26, 2009 at 09:00 AM  
in 2nd Floor Southwest with Judge DIREDA.

03-16-09 Judge MICHAEL DIREDA assigned.

03-26-09 Minute Entry - Minutes for APP MOTION TO TERMINATE

Judge: MICHAEL DIREDA

PRESENT

Clerk: debbieg

Prosecutor: TREE, TERAL L

Defendant not present

Video

Tape Number: 2D032609 Tape Count: 12:23-12:27

HEARING

This is time set for a motion to terminate formal probation with

Adult Probation & Parole. The Court denies the motion until all restitution has been paid in full.

02-10-10 APP MOTION TO TERMINATE scheduled on February 25, 2010 at 09:00 AM in 2nd Floor Southwest with Judge DIREDA.

02-25-10 Minute Entry - Minutes for APP MOTION TO TERMINATE

Judge: MICHAEL DIREDA

PRESENT

Clerk: debbieg

Prosecutor: WILLOUGHBY, BENJAMIN B

Defendant not present

Audio

Tape Number: 2D022510 Tape Count: 9:13-9:16

HEARING

This is time set for a motion to terminate formal probation with Adult Probation & Parole. Defendant is not present.

The Court grants the motion for unsuccessful termination and reduces the fines, fees and restitution to a civil judgment and transfers them to the Office of State Debt Collection.

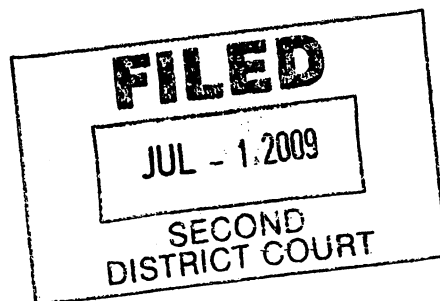
02-25-10 Filed order: Progress Violation Report (Approved Unsuccessful Termination)

Judge MICHAEL DIREDA

Signed February 25, 2010

Tab E

James C. Jenkins (#1658)  
OLSON & HOGGAN, P.C.  
130 South Main, Suite 200  
P.O. Box 525  
Logan, Utah 84323-0525  
Telephone (435) 752-1551



*Attorneys for Randy Patterson, Trustee of The  
Darlene Patterson Family Protection Trust*

RECEIVED JUN 30 2009

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF UTAH, IN AND FOR THE COUNTY OF DAVIS**

RON PATTERSON,	)	
	)	<b>SUPPLEMENTAL</b>
	)	<b>AND CORRECTED</b>
Plaintiff,	)	<b>AFFIDAVIT OF RANDY</b>
	)	<b>PATTERSON</b>
v.	)	
	)	
RANDY D. PATTERSON, as Trustee of the	)	
Darlene Patterson Family Protection Trust,	)	
ESTATE OF DARLENE PATTERSON, <i>et</i>	)	
<i>al.</i> ,	)	Civil No. 070700586
	)	
Defendants.	)	Judge: Michael J. Alphin
	)	

STATE OF UTAH     )  
                              : ss.  
County of Cache     )

RANDY PATTERSON, being first duly sworn upon oath, deposes and states as follows:

1. I am a Defendant in the above captioned matter, I am a child of Darlene Patterson, and I am a brother of Plaintiff, Ron Patterson.

2. I have personal knowledge of the following except where otherwise stated, and I am competent to testify.



3. I am aware that on July 30, 1999, Darlene Patterson created the Darlene Patterson Family Protection Trust (the "Family Trust"). The Family Trust was prepared by Darlene's attorney, David Ray Carver.

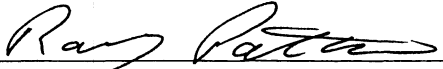
4. Before and after our mother's death, Plaintiff admitted to me that during the time when Plaintiff was living next to Darlene Patterson, Plaintiff unlawfully used Darlene's credit card without authorization to make personal purchases including four-wheelers for his business. Plaintiff acknowledged that he made many of these purchases online through Ebay and PayPal. Plaintiff also acknowledged that when Darlene discovered that these transactions had taken place, she objected and notified PayPal that Plaintiff had no authority to use her credit card.

5. In or about February of 2006, Darlene Patterson received a check from the State of California in the amount of \$52,936.53 payable to Darlene for a project involving real property which Darlene owned in California. Plaintiff, however, stole the check, forged Darlene's signature, cashed the check, and used the check funds for his personal benefit without Darlene's knowledge or permission. Plaintiff has admitted these facts to me before and after our mother's death. Eventually, Plaintiff's conduct was discovered, and Plaintiff was prosecuted for the felony crime of "Elder Abuse" or "Exploitation of an Elder", which after negotiations was reduced to a felony attempt charge of the same crime. Darlene was the complaining witness. In connection with his conviction, Plaintiff was ordered to pay restitution to Darlene in the amount of \$52,935.00, and was sentenced to jail and probation. Plaintiff has acknowledged these facts to me. (See also the attached Exhibit "A").

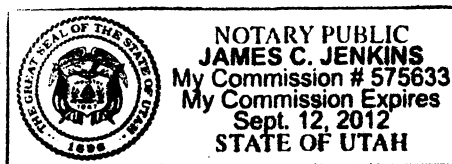
6. Soon after Darlene discovered Plaintiff's wrongdoing discussed in Paragraph 5 above, she asked Mr. Carver to prepare another amendment to the Darlene Patterson Family Protection Trust (the "Final Amendment"), which she executed on May 30, 2006. I was present when Darlene asked Mr. Carver to prepare the Final Amendment and when she executed it on May 30, 2006.

7. I have read the foregoing Supplemental Affidavit, know the contents thereof and state the same to be true.

DATED this 27 day of June, 2009.

  
Randy Patterson

SUBSCRIBED AND SWORN to before me this 29 day of June, 2009.




  
NOTARY PUBLIC

**CERTIFICATE OF MAILING**

I hereby certify that on this 29 day of June, 2009, I mailed a true and correct copy of the foregoing **SUPPLEMENTAL AND CORRECTED AFFIDAVIT OF RANDY PATTERSON**, postage prepaid in Logan, Utah, to the following:

L. Miles LeBaron  
Tyler J. Jensen  
LEBARON & JENSEN, P.C.  
476 West Heritage Park Blvd., Suite 200  
Layton, Utah 84041

Craig T. Peterson  
CATHCART & PETERSON, LLC  
80 North Main Street  
Bountiful, Utah 84010  
*Attorney for Individual Defendants*







EXHIBIT

A

SECOND DISTRICT COURT - OGDEN  
WEBER COUNTY, STATE OF UTAH

STATE OF UTAH vs. RONALD STEVEN PATTERSON

CASE NUMBER 061903836 State Felony

CHARGES

Charge 1 - 76-5-111.1(4A) - ATTEMPTED EXPLOITATION OF DISABLD  
OR ELDER ADLT 2nd Degree Felony (amended) to 3rd Degree Felony  
Offense Date: January 19, 2006  
Plea: February 22, 2007 Guilty  
Disposition: February 22, 2007 Guilty

CURRENT ASSIGNED JUDGE  
MICHAEL DIREDA

PARTIES

Defendant - RONALD STEVEN PATTERSON

Plaintiff - STATE OF UTAH

DEFENDANT INFORMATION

Defendant Name: RONALD STEVEN PATTERSON  
Offense tracking number: 14800775  
Date of Birth: June 03, 1957  
Law Enforcement Agency: OGDEN CITY POLICE  
Prosecuting Agency: WEBER COUNTY

ACCOUNT SUMMARY

TOTAL REVENUE	Amount Due:	0.75
	Amount Paid:	0.75
	Credit:	0.00
	Balance:	0.00

PAPER BOND TOTALS	Posted:	10,000.00
	Forfeited:	0.00
	Exonerated:	10,000.00
	Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

	Amount Due:	0.75
	Amount Paid:	0.75
	Amount Credit:	0.00
	Balance:	0.00

CASE NUMBER 061903836 State Felony

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## NONMONETARY BOND DETAIL - TYPE: Surety

Posted By: BEEHIVE BAIL BONDS  
Posted: 10,000.00  
Forfeited: 0.00  
Exonerated: 10,000.00  
Balance: 0.00

## CASE NOTE

APP PROBATION

## PROCEEDINGS

09-27-06 Judge PARLEY R BALDWIN assigned.  
09-27-06 Warrant ordered on: September 27, 2006 Warrant Num: 981083438  
Bail Allowed  
Bail amount: 10000.00  
09-27-06 Warrant issued on: September 27, 2006 Warrant Num: 981083438  
Bail Allowed  
Bail amount: 10000.00  
Judge: ROGER S DUTSON  
Issue reason: Based on Affidavit and Order for Warrant of Arrest  
09-27-06 Note: Michael Murphy enters his appearance of counsel.  
09-27-06 Note: Undertaking of bail by Beehive Bail Bonds \$10,000.00 to WCJ 9-22-2006.  
09-27-06 Bond Account created Total Due: 10000.00  
09-27-06 Bond Posted Non-Monetary Bond: 10,000.00  
09-27-06 Case filed  
09-27-06 Filed: From an Information  
09-27-06 Filed: Information  
09-28-06 INITIAL APPEARANCE scheduled on October 19, 2006 at 09:00 AM in 3rd Floor Southwest with Judge BALDWIN.  
09-28-06 Warrant recalled on: September 28, 2006 Warrant num: 981083438  
Recall reason: Based on Court order  
09-28-06 Filed: NOTICE OF APPEARANCE FOR MICHAEL MURPHY FOR DEF  
09-28-06 Filed: Motion AND REQUEST FOR DISCOVERY  
10-02-06 Filed: AMENDED NOTICE OF APPEARANCE FOR MURPHY FOR DEFENDANT  
10-02-06 Filed: AMENDED MOTION AND FOR DISCOVERY REQUEST  
10-19-06 PRELIMINARY HEARING scheduled on November 30, 2006 at 09:00 AM in 3rd Floor Southwest with Judge BALDWIN.  
10-19-06 Minute Entry - Minutes for Initial Appearance  
Judge: PARLEY R. BALDWIN  
PRESENT  
Clerk: debbieg  
Prosecutor: NEIDER, CAMILLE L  
Defendant  
Defendant's Attorney(s): MURPHY, MICHAEL D

CASE NUMBER 061903836 State Felony

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Video

Tape Number: PRB101906 Tape Count: 10:15-10:17

INITIAL APPEARANCE

A copy of the Information is given to the defendant.

The Information is read.

Advised of charges and penalties.

Defendant is present with private counsel, Michael Murphy.

Preliminary hearing is requested and set for 11/30/06.

PRELIMINARY HEARING is scheduled.

Date: 11/30/2006

Time: 09:00 a.m.

Location: 3rd Floor Southwest  
Second District Court  
2525 Grant Avenue  
Ogden, UT 84401

Before Judge: PARLEY R. BALDWIN

11-30-06 PRE-TRIAL CONFERENCE scheduled on December 28, 2006 at 09:00 AM  
in 3rd Floor Southwest with Judge BALDWIN.

11-30-06 Minute Entry - Minutes for PRELIMINARY HEARING

Judge: PARLEY R. BALDWIN

PRESENT

Clerk: debbieg

Prosecutor: NEIDER, CAMILLE L

Defendant

Defendant's Attorney(s): MURPHY, MICHAEL D

Video

Tape Number: PRB113006 Tape Count: 10:18-10:19

HEARING

This is time set for preliminary hearing. Defendant is present and is represented by Michael Murphy, private counsel.

The defendant waives his preliminary hearing, and the Court accepts the waiver. The Court arraigns the defendant on the information and holds him for trial.

ARRAIGNMENT

A copy of the information is given to the defendant.

Advised of rights and penalties.

The information is read.

Defendant enters a plea of not guilty to the charge. Court sets a pre-trial on 12/28/06 @ 9:00 a.m.

PRE-TRIAL CONFERENCE is scheduled.

Date: 12/28/2006

2525 Grant Avenue  
Ogden, UT 84401

Before Judge: PARLEY R. BALDWIN

11-30-06 Charge 1 Plea is Not Guilty

12-28-06 PRE-TRIAL CONFERENCE scheduled on February 01, 2007 at 09:00 AM  
in 3rd Floor Southwest with Judge BALDWIN.

12-28-06 JURY TRIAL scheduled on February 27, 2007 at 09:00 AM in 3rd  
Floor Southwest with Judge BALDWIN.

12-28-06 JURY TRIAL scheduled on February 28, 2007 at 09:00 AM in 3rd  
Floor Southwest with Judge BALDWIN.

12-28-06 Minute Entry - Minutes for PRE-TRIAL CONFERENCE

Judge: PARLEY R. BALDWIN

PRESENT

Clerk: debbieg

Prosecutor: DECARIA, MARK R

Defendant

Defendant's Attorney(s): MURPHY, MICHAEL D

Video

Tape Number: PRB122806 Tape Count: 9:45-9:46

HEARING

This is time set for pre-trial conference. Defendant is present  
and is represented by Michael Murphy, private counsel.

Jury trial is requested and set for 2/27 and 2/28/07 @ 9:00 a.m.

Pre-trial is requested and set for 2/1/07.

PRE-TRIAL CONFERENCE is scheduled.

Date: 02/01/2007

Time: 09:00 a.m.

Location: 3rd Floor Southwest  
Second District Court  
2525 Grant Avenue  
Ogden, UT 84401

Before Judge: PARLEY R. BALDWIN

JURY TRIAL.

Date: 02/27/2007

Time: 09:00 a.m.

Location: 3rd Floor Southwest  
Second District Court  
2525 Grant Avenue  
Ogden, UT 84401

Before Judge: PARLEY R. BALDWIN

JURY TRIAL.

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CASE NUMBER 061903836 State Felony

Date: 02/28/2007

Time: 09:00 a.m.

Location: 3rd Floor Southwest  
Second District Court  
2525 Grant Avenue  
Ogden, UT 84401

Before Judge: PARLEY R. BALDWIN

44C

02-01-07 DISPOSITIOIN scheduled on February 22, 2007 at 09:00 AM in 3rd Floor Southwest with Judge BALDWIN.

02-01-07 Minute Entry - Minutes for PRE-TRIAL CONFERENCE

Judge: PARLEY R BALDWIN

PRESENT

Clerk: debbieg

Prosecutor: HEWARD, GARY R

Defendant

Defendant's Attorney(s): MURPHY, MICHAEL D

Video

Tape Number: PRB020107 Tape Count: 9:16-9:17

#### HEARING

This is time set for pre-trial conference. Defendant is present and is represented by Michael Murphy, private counsel.

Mr. Murphy makes a motion to strike the trial date and continue this case for the defendant to enter a plea of guilty. Court grants the request.

DISPOSITIOIN is scheduled.

Date: 02/22/2007

Time: 09:00 a.m.

Location: 3rd Floor Southwest  
Second District Court  
2525 Grant Avenue  
Ogden, UT 84401

Before Judge: PARLEY R BALDWIN

02-01-07 JURY TRIAL Cancelled.

02-22-07 Filed order: Statement of Defendant in Support of Guilty Plea and Certificate of Counsel and Order

Judge PARLEY R BALDWIN

Signed February 22, 2007

02-22-07 APP SENTENCING scheduled on April 05, 2007 at 09:00 AM in 3rd Floor Southwest with Judge BALDWIN.

02-22-07 Minute Entry - Minutes for DISPOSITION

Judge: PARLEY R BALDWIN

PRESENT

Clerk: debbieg

Prosecutor: DECARIA, MARK R

Defendant

Defendant's Attorney(s): MURPHY, MICHAEL D

Printed: 06/29/09 14:55:10

Page 5

CASE NUMBER 061903836 State Felony

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Video

Tape Number: PRB022207 Tape Count: 9:41-9:46

#### HEARING

This is time set for disposition. Defendant is present and is represented by Michael Murphy, private counsel.

State makes a motion to amend the charge to Attempted Exploitation of Disabled or Elder Adult, a third degree felony. Court grants the motion.

The Court relies on the Statement of Defendant in Support of Guilty Plea and Certificate of Counsel to supplement a Rule 11 colloquy. Plea agreement executed in open court.

Defendant enters a plea of guilty to the amended charge of Attempted Exploitation of Disabled or Elder Adult, a class third degree felony.

Pre-sentence is requested with sentencing continued to 4/5/07. APP SENTENCING is scheduled.

Date: 04/05/2007

Time: 09:00 a.m.

Location: 3rd Floor Southwest  
Second District Court  
2525 Grant Avenue  
Ogden, UT 84401

Before Judge: PARLEY R BALDWIN

02-22-07 Charge 1 Disposition is Guilty

02-22-07 Charge 1 amended to 3rd Degree Felony

04-05-07 Minute Entry - Minutes for APP SENTENCING

Judge: PARLEY R BALDWIN

PRESENT

Clerk: debbieg

Prosecutor: DECARIA, MARK R

Defendant

Defendant's Attorney(s): MURPHY, MICHAEL D

Video

Tape Number: PRB040507 Tape Count: 10:16-10:34

HEARING

This is time set for sentencing. Defendant is present and is represented by Michael Murphy, private counsel. Court proceeds with sentencing.

SENTENCE PRISON

Based on the defendant's conviction of ATTEMPTED EXPLOITATION OF DISABLD OR ELDER ADLT a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in

Printed: 06/29/09 14:55:11

Page 6

CASE NUMBER 061903836 State Felony

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the Utah State Prison.

The prison term is suspended.

SENTENCE JAIL

Based on the defendant's conviction of ATTEMPTED EXPLOITATION OF DISABLD OR ELDER ADLT a 3rd Degree Felony, the defendant is sentenced to a term of 45 day(s)

ORDER OF PROBATION

The defendant is placed on probation for 3 year(s).

Probation is to be supervised by Adult Probation and Parole.

Defendant to serve 45 day(s) jail.

PROBATION CONDITIONS

487

The defendant shall enter into an agreement with the Utah State Department of Adult Probation & Parole and comply strictly with its terms and conditions.

The defendant shall report to the Department of Corrections and to the court whenever required.

The defendant shall violate no law, either federal, state or municipal.

The defendant shall not consume alcohol or illegal drugs.

The defendant shall submit to random search, seizure, and chemical testing.

The defendant shall not frequent establishments where alcohol is the chief menu item nor associate with persons using alcohol or illegal drugs.

The defendant shall provide a DNA sample, to be obtained by Adult Probation and Parole, and pay all costs.

The defendant shall serve 45 days in the Weber County Jail with credit for time served granted.

The defendant shall report to the Weber County Jail on 4/9/07 @ 8:00 a.m. and may be released to the Kiesel facility for employment.

The defendant shall not have a power of attorney while on probation.

The defendant shall complete any treatment deemed necessary under the direction of Adult Probation and Parole.

The defendant shall pay restitution in the amount of \$52,935.00 on behalf of the victim, Darlene Patterson, payable through Adult Probation and Parole.

04-05-07 Bond Exonerated -10,000.00

04-09-07 Judgment #1 Entered \$ 52935.00

Creditor: DARLENE PATTERSON

Debtor: RONALD STEVEN PATTERSON

52,935.00 Restitution

52,935.00 Judgment Grand Total

04-09-07 Filed judgment: Sentence, Judgment, Commitment

Printed: 06/29/09 14:55:11

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CASE NUMBER 061903836 State Felony

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Judge PARLEY R BALDWIN

Signed April 05, 2007

10-18-07 Fee Account created Total Due: 0.75

10-18-07 COPY FEE Payment Received: 0.75

Note: 1.00 cash tendered. 0.25 change given.

03-16-09 APP MOTION TO TERMINATE scheduled on March 26, 2009 at 09:00 AM  
in 2nd Floor Southwest with Judge DIREDA.

03-16-09 Judge MICHAEL DIREDA assigned.

03-26-09 Minute Entry - Minutes for APP MOTION TO TERMINATE

Judge: MICHAEL DIREDA

PRESENT

Clerk: debbieg

Prosecutor: TREE, TERAL L

Defendant not present

Video

Tape Number: 2D032609 Tape Count: 12:23-12:27

2



HEARING

This is time set for a motion to terminate formal probation with Adult Probation & Parole. The Court denies the motion until all restitution has been paid in full.

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Tab F

**THE  
DARLENE PATTERSON  
FAMILY PROTECTION TRUST**

This Agreement is made and entered into this 30th day of July, 1999, by and between Darlene Patterson, (hereinafter referred to as the "Undersigned"), of West Point, Davis County, State of Utah, and Darlene Patterson and Rex E. Patterson, (hereinafter referred to as "Trustees").

The name of this trust shall be The Darlene Patterson Family Protection Trust.

Darlene Patterson hereby transfers and delivers to the Trustees (or their successor Trustees) the property listed in the attached Schedule "A" (which is incorporated herein), and the Trustees agree to hold said property and any other property which may be transferred to this trust by either inter vivos or testamentary transfer; and all said property shall be part of the trust and shall be held, administered and distributed by the Trustees according to the terms and conditions stated herein.

**ARTICLE I**

**PURPOSES AND BIRTH DATES**

1.1 Purpose of the Trust. This Trust is established for the primary benefit of the Undersigned during the Undersigned's lifetime, for the Undersigned's family thereafter.

1.2 Family and Birth Dates. The Family of the Undersigned consists of, among others, the following:

Spouse of the Undersigned:

Rex E. Patterson

Children of the Undersigned:

Gary E. Patterson, January 16, 1944

Judy Ann Henry, born December 20, 1946

Rex A. Patterson, born January 14, 1947

Vicky D. Romero, born December 31, 1950

Ronald S. Patterson, June 3, 1957

Ricky A. Patterson, born April 28, 1958

Randy D. Patterson, born December 19, 1964

The dates of birth above referred to may be relied upon by the Trustees for all purposes.

1.3 Community Property. If the Undersigned transfers property to this Trust which constitutes community property pursuant to the laws of any community property state having jurisdiction over such property, such property shall retain its character as community property while held hereunder until the earlier of the death of the Undersigned or the Undersigned's spouse. If the Undersigned removes such property from this Trust, such property shall continue to retain its character as community property. In addition, as to all community property which is transferred to this Trust, this Trust shall:

(a) Remain revocable in whole or in part during the joint lives of the Undersigned and the Undersigned's spouse,

(b) All said property that is transferred to this Trust shall remain community property and any withdrawals therefrom shall be community property of the Undersigned's spouse,

(c) During the joint lives of the Undersigned and the Undersigned's spouse, the Trustees of this Trust shall have powers no more extensive than those possessed by the Undersigned or the Undersigned's spouse under the statutory provisions setting forth the rights and powers with regards to any community personal and real property generally; and

(d) As to community property, this Trust shall be subject to amendment or alteration during the joint lives of the Undersigned and the Undersigned's spouse upon their joint consent.

## ARTICLE II

### DISPOSITION DURING THE LIFE OF THE UNDERSIGNED OR INCAPACITY

2.1 Income and Principal. During the lifetime of the Undersigned, such or all of the principal of the Trust Estate and any income which such principal shall generate shall be paid or delivered to such persons and in such manner from time to time as the Undersigned shall direct in writing or, in the absence of such direction, the Trustees shall pay or apply for the benefit of the Undersigned, such amounts to such persons as in the sole and absolute discretion of the Trustees is deemed necessary and proper for the health, support, maintenance and welfare of the Undersigned, in accordance with the

Undersigned's accustomed manner of living at the date of this instrument. The Trustees shall exercise in a liberal manner the power to invade principal included in this paragraph 2.1, and the rights of the remainderman in the Trust shall be considered of secondary importance.

2.2 Guardianship. During physical or mental incapacitation, the Undersigned herein appoints the successor Trustees to succeed his or her place as a successor Trustee, guardian, or other legal capacity, whether appointed orally or in writing, and to supervise all matters in which the Undersigned had a right to act if the Undersigned had not become incapacitated.

### ARTICLE III

#### AMENDMENT, REVOCATION AND ADDITIONS TO TRUST

3.1 Rights of the Undersigned. As long as the Undersigned is alive, the Undersigned reserves the right to amend, modify or revoke this Trust in whole or in part, including the principal, and the present or past undisbursed income from such principal. Such revocation or amendment of this Trust may be in whole or in part by written instrument. Amendment, modification or revocation of this instrument shall be effective only when such change is delivered in writing to the then acting Trustee or Trustees. On the revocation of this instrument in its entirety, the Trustees shall deliver to the Undersigned, as the Undersigned may direct in the instrument of revocation, all of the Trust property.

3.2 Interests of the Beneficiaries. The interests of the beneficiaries are presently vested interests subject to divestment which shall continue until this Trust is revoked or terminated other than by death. As long as this Trust subsists, the Trust properties and all the rights and privileges hereunder shall be controlled and exercised by the Trustees named herein in their fiduciary capacity.

3.3 Additions to Trust. It is understood that the Undersigned or any other person may grant, and the Trustees may receive as part of this Trust, additional real and personal property by assignment, transfer, deed, or other conveyance, or by any other means, testamentary or inter vivos, for inclusion in the Trust herein created. Any such property so received by the Trustees shall become part of the Marital Trust or Family Trust (hereafter described) to which said property is appointed and into which it is transferred and shall become subject to the terms of this Trust Agreement. If such property is not specifically appointed to either the Marital Trust or the Family Trust in particular, it shall be held, administered and distributed according to the terms of this entire Trust instrument.

3.4 After-Acquired Property. It is specifically the intention of the Undersigned that all real and personal properties now owned by the Undersigned, except for joint tenancy property, may be added to this Trust; provided further that all future real and personal properties acquired by the Undersigned may become a part of this Trust at the time acquired by the Undersigned.

## ARTICLE IV

### DISPOSITION ON THE DEATH OF THE UNDERSIGNED

4.1 Basic Trust Division, Trust Names, and Survivorship. At the death of the Undersigned, if the spouse of the Undersigned is then living, the Trustees shall divide the Trust Estate into two separate trusts, hereinafter designated as the "Marital Trust" and the "Family Trust", respectively, to be held, administered and distributed according to this Article VI as hereinafter stated. At the death of the Undersigned, if the spouse of the Undersigned has predeceased the Undersigned, then the trustees shall hold, administer and distribute the assets of this trust in accordance with Article V. In case of simultaneous death between the Undersigned and the Undersigned's spouse, whoever has the smallest estate shall be presumed to have survived the other in order to effect the lowest combined federal and state estate or inheritance taxes. The preceding sentence and Section 4.3 shall be interpreted to achieve the lowest possible combined state and federal estate taxes for the Undersigned and the Undersigned's spouse.

4.2 Debts and Taxes. All debts, expenses of last illness and funeral expenses, attorneys fees, and other costs incurred in the administration of the estate of the Undersigned, and all foreign, federal, estate, transfer, inheritance, and succession taxes payable by reason of the death of the Undersigned, may in the sole discretion of the trustees, be paid out of the Trust assets contributed to the Trust by the Undersigned. The Undersigned absolves his or her surviving spouse, if any, from any liability for any of said debts or expenses. The Trustees shall have power to determine whether or not any or all of the secured debts shall be paid (including debts secured by property passing by joint tenancy) and thus exonerate particular properties from debt. Hence, the Trustees may pay secured debts, may obtain renewals or extensions of secured debts, may distribute property subject to such debts, and may do other acts which the Trustees deem appropriate and for the best interest of the Trust and the beneficiaries thereof. The Trustees shall have discretion to require that the recipients of any assets included in the federal gross estate of the Undersigned pay their proportionate share of any federal, state or any taxes. The aforementioned is subject to two exceptions: (i) none of the said hereinbefore described debts, expenses or federal, state, foreign estate or other taxes shall be borne by the surviving spouse of the Undersigned with respect to any such non probate assets or probate assets qualifying for the Marital deduction, but shall be charged to the

Family Trust; and (ii) the proceeds received from any life insurance policies on the Undersigned's life or from qualified pension or profit sharing plans, and which may or may not be included in the gross estate of the Undersigned, shall not be liable for, or paid toward the debts, expenses, death taxes, or other charges against the estate of the Undersigned, if there are other assets available for such payment. Further, any proceeds received from insurance policies or retirement plans because of the death of the Undersigned, and which are not included in the federal taxable estate of the Undersigned, shall become assets of the Family Trust and not the Marital Trust. The reason for this is to keep those assets from being taxed in the estate of the Undersigned. The Trustee is given authority to do whatever is necessary to keep those assets out of the federal taxable estate of the Undersigned.

4.3 Initial Corpus of the Marital Trust. If the Undersigned's spouse shall survive the Undersigned, the Trustee shall set aside, transfer and pay over to the Marital Trust all of the assets of this Trust. Notwithstanding anything contained in this paragraph, if a reduction of the property passing to the Marital Trust under this paragraph would not result in any increase in the federal estate tax upon the Undersigned's estate (after taking into account all credits allowable against such tax), said amount shall be reduced by the largest amount which will result in no increase in federal estate tax upon the Undersigned's estate, and such amount shall not pass under this paragraph but instead shall pass and be governed by the provisions of Article 4.5 of this Trust. In determining the amount of any such reduction, the final determination in the federal estate tax proceeding in the Undersigned's estate shall control, and there shall be taken into account all property passing or which shall have passed to or for the benefit of the Undersigned's spouse under this Trust, the Undersigned's Will or otherwise. Such reduction shall be deemed a dollar amount reduction, and the property passing as a result thereof under Article 4.5 of this Trust shall not participate in increases or decreases during the administration of the Undersigned's estate. To the extent possible, assets with respect to which the marital reduction is not allowable for purposes of federal estate tax on the Undersigned's estate, or with respect to which a credit for foreign death taxes is allowable for such purposes, shall be allocated to the property passing to the Trust created under Article 4.5 of this Trust.

4.4 Marital Trust Purposes. The Marital Trust shall be held by the Trustees, separately in trust, for the following purposes:

4.401 Income Distribution. The Trustees shall pay to the surviving spouse of the Undersigned, commencing as of the date of the Undersigned's death, all of the income from the Trust in monthly or other convenient installments, but in no event less frequently than in quarter-annual installments.

4.402 Principal Distribution. Whenever the Trustees determine that the funds available to the surviving spouse of the Undersigned from all sources, including the income from the Marital Trust, are not sufficient for proper care, maintenance, support and travel, including but not limited to the needs arising from illness, accident or misfortune of the surviving spouse of the Undersigned, and funds required to permit the purchase of residences, the Trustees at any time and from time to time may, in their sole discretion, pay or distribute to the surviving spouse of the Undersigned so much of the principal of the Trust as they shall deem necessary or advisable under the circumstances, and the rights of the remaindermen in the Trust shall be considered of secondary importance.

4.403 Distribution on Death of Surviving Spouse. Upon the death of the surviving spouse of the Undersigned, the Trustees shall continue to hold and distribute the rest, residue and remainder of this Trust as subject to and under the provisions of Article V; provided, however, that the Trustees may, in their discretion, first pay from the Marital Trust all debts, expenses and death taxes of the Undersigned's spouse.

4.404 Disclaimer. The surviving spouse of the Undersigned, or his or her executor, after the Undersigned's death, may disclaim in writing the surviving spouse's interest in the Marital Trust. If the surviving spouse of the Undersigned disclaims part or all of the interest given to the Marital Trust as referred to in Article IV, the disclaimed properties shall pass to and become part of the Family Trust, and shall be distributed as set forth therein.

4.5 The Initial Corpus and Purposes of the Family Trust. The Family Trust shall contain the balance of the Trust Estate remaining after setting aside all property of the Trust Estate that is included in the Marital Trust. The Family Trust shall not be subject to the payment of the debts and death taxes of the Undersigned. The Family Trust shall be held by the Trustees separately in trust for the following purposes:

4.501 Principal and Income Distribution. During the lifetime of the spouse of the Undersigned, the Trustees may distribute, commencing as of the date of the Undersigned's death, to said spouse and any children or grandchildren of the Undersigned, such part or all of the principal and income of the Family Trust as the trustees, in their sole discretion, deem necessary or appropriate for the support and maintenance of the surviving spouse and said children and grandchildren in the standard of living to which they are accustomed, including reasonable and adequate health, medical, mental, hospital, nursing and invalidism expenses.



4.502 Primary Consideration of Spouse and Minor Children. In exercising the discretions imposed upon the Trustee, the Trustees are directed that primary consideration be given to the surviving spouse and the surviving minor children, inasmuch as they shall likely be the ones with the greatest needs.

4.503 Exclusive Special Power of Appointment Exercisable Inter Vivos or Testamentarily; Gift Over in Default. Notwithstanding any of the provisions above, during the life or at the death of the surviving spouse of the Undersigned, the Trustees shall hold, administer or distribute the assets of the Family Trust to or for the benefit of any one or more of (i) the Undersigned's issue; (ii) spouses of the Undersigned's deceased issue; or (iii) siblings or any issue of the siblings of the Undersigned, as the surviving spouse of the Undersigned shall appoint by exercise of this exclusive special power of appointment provided herein. Such special power of appointment shall be exercised either inter vivos by a written direction delivered to the Trustees of this Trust or by a Will made after the death of the Undersigned, which specifically refers to the power herein given. Any appointment by the spouse of the Undersigned may be of such estates and interest and upon such terms, trusts, conditions, powers and limitations as the surviving spouse shall determine.

Any appointment may exclude any one or more of the beneficiaries of any enumerated class. If, or to the extent that, the spouse of the Undersigned does not exercise this testamentary special power of appointment, at the death of the spouse of the Undersigned, said assets of the Family Trust shall pass as directed in Article V. However, this special power shall not apply to any trust property which the holder of the power at any time gifted to the Undersigned which would be included in the estate of the holder for federal estate tax purposes if the holder were to leave such power under IRC Section 2038.

## ARTICLE V

### DISPOSITION ON THE DEATH OF THE UNDERSIGNED AND THE UNDERSIGNED'S SPOUSE

All Trust principal with all accumulated income thereof, directed to be disposed of under the provisions of Article V shall, upon the death of the Undersigned and the Undersigned's spouse, be held in trust for the benefit of the then living children of the Undersigned, and the then living issue of any deceased children of the Undersigned, and shall be disposed of as follows:

5.1 Support and Education. All remaining Trust assets (principal and income) shall be held, administered and distributed as follows: Until the youngest living child of the Undersigned is age 25, the Trustees, in their sole discretion, shall distribute such funds from income or principal of the Trust Estate, as they deem necessary for the support, maintenance and education of the Undersigned's children, and grandchildren (if the Trustees deem the grandchildren to be in need); such payments need not be equal in amounts. The Trustees shall take into account the needs, ages, assets and other available sources of income and support of the Undersigned's children. The Undersigned further particularly directs the Trustees that in exercising their discretion hereunder, they should make reasonable allowance for the degree of educational expenses at undergraduate college and post-graduate college level that have been expended for various of their children and that should thereafter be expended for various others of their children, in order to treat their children with some degree of fairness with respect to the receipt of educational funds from them. The Trustees shall determine the amount to be distributed, the beneficiary to whom distributions are to be made, and the time and manner of distributions made under this Section, and shall distribute the amounts according to the various needs of the beneficiaries, even if such distribution is unequal. Any such payment is to be charged against the Trust Estate as a whole, rather than against the ultimate distributive share of the beneficiary to whom payment is made. If amounts are not disbursed under this provision after the youngest living child has reached age 25; then the remainder shall be distributed according to Section 5.2.

5.2 Distribution. After all the surviving children of the Undersigned attain age 25, the Trustee shall divide the remaining principal and income of the Trust Estate into as many equal shares as there are children of the Undersigned then living, and children of the Undersigned then deceased with issue then living; provided, further, that each of said equal shares shall either be distributed or held and administered, and later distributed by the Trustees as separate trust, as follow:

5.201 Living Children. One share shall be set aside for the benefit of each of the Undersigned's children who may then be living and distributed or held in trust as follows:

Each of the Trusts mentioned above for a separate child of Undersigned shall be held as a life estate and in trust for the life of the respective child of the Undersigned. The Trustees during the life of each Trust beneficiary (who is a child of the Undersigned) shall invest the income, add it to principal, and shall be granted a power of invasion over the principal and income of the Trust and may exercise that power of invasion, in the Trustee's sole and uncontrolled discretion, for the support, education, medical care and maintenance of the respective Trust beneficiary during his lifetime. The beneficiary is given no power of invasion over the Trust.

At such time as a Trust beneficiary (a child of the Undersigned) dies, or if said child dies prior to the Undersigned, then his or her share shall continue to be held in Trust for the benefit of his children (grandchildren of the Undersigned) until the youngest of said children reach the age of 25. Until the youngest of said children reach the age of 25, the Trustee shall continue to hold the assets of the trust estate and may invade the income and principal of the Trust for the support, maintenance, medical care and education for the beneficiaries of the Trust as the trustee in the trustee's sole and uncontrolled discretion deems best. At such time as the youngest living child of a deceased child of the Undersigned reaches the age of 25, then that Trust shall terminate and be paid out in equal shares by right of representation to the issue of each child of the Undersigned for whose benefit the trust is set up. By way of example, upon the death of Gary E. Patterson, his Trust shall continue to be held for the benefit of his issue, if he then has any. At such time as the youngest child of Gary E. Patterson reaches the age of 25, the Trust shall terminate and the Trustee shall pay the Trust assets out to the issue of Gary E. Patterson by right of representation. In the event a child of the Undersigned dies without having issue surviving, then in that event their respective share shall be transferred in equal shares to the other Trusts established for the children of the Undersigned pursuant to this paragraph, to be held, administered and distributed in accordance with said Trust terms.

For each Trust which is otherwise to be established under this Trust instrument and to which any of the Undersigned's generation-skipping exemption is allocated, unless the Trust thereby has a generation-skipping inclusion ratio of zero, the Trustee shall instead establish two separate Trusts so that each separate Trust has a generation-skipping inclusion ratio of either zero (the Exempt Trust) or one (the Nonexempt Trust). This is to be accomplished by allocating to the Nonexempt Trust the minimum amount of property necessary to establish that Trust with an inclusion ration of one, while leaving the Exempt Trust with an inclusion ratio of zero.

5.3 Alternative Distribution. If all of the above distributions fail, then the Trustee shall distribute the property of this Trust equally to those persons who would constitute heirs at law of the Undersigned, in the proportions provided by the law of descent and distribution of the state whose laws govern this Trust.

## ARTICLE VI

### TRUSTEE AND EXECUTOR ADMINISTRATIVE PROVISIONS

6.1 In General. The personal representative of the estate of the Undersigned and the Trustees of this Trust shall have as complete power and discretion with respect to administration and management of the Undersigned's estate and this Trust, as the

Undersigned had over the Undersigned's property while living; such power and discretion shall include, by way of illustration and not of limitation, and in addition to any inherent, implied or statutory power not inconsistent with the other provision of this Trust, and the Undersigned's Will, the power thereafter enumerated in this Article. The word "Trustees" hereinafter shall refer to the Trustees of this Trust, and the personal representative of the Undersigned's estate and "Trust Estate" shall refer to the Trust Estate of the Trust and the estate outside of this Trust of the Undersigned.

6.2 Investments. The Trustees may purchase or otherwise acquire and retain, whether originally a part of any Trust Estate hereunder or subsequently acquired, any and all stocks, bonds, notes and other such securities or any variety of real or personal property, including stocks or interests in investment trusts, mutual funds and common trust funds (including common trust funds maintained by the Trustees) as the Trustees may deem advisable, whether or not such investments be of a character permissible for investments by fiduciaries. Investments need not be diversified and may be made or retained with a view toward possible increase in value, notwithstanding the amount or absence of income therefrom.

6.3 Types of Transactions. The Trustees may sell, exchange, lease, pledge, mortgage, transfer, convert, or otherwise dispose of or grant options with respect to any and all properties at any time forming a part of the Trust Estate, in such manner, at such time or times, for such purposes, for such prices and upon such terms, credits and conditions as the Trustees may deem advisable. Any lease or contract made by the Trustees may extend beyond the period fixed by statute for leases or contracts made by fiduciaries and may extend beyond the duration of any trust hereunder.

6.4 Borrowing. The Trustees may borrow money from any source, including the Trustees, for the benefit of the Trust Estate created hereunder, and as security for any such loan, may mortgage or pledge any property in any Trust Estate created hereunder.

6.5 Management. The Trustees may vote in person or by general or limited proxy with respect to any shares of stock or other securities held by the Trustees, may become a party to or deposit securities or other property under or accept securities issued under any voting trust agreement (whether or not extending beyond the duration of any trust hereunder) any may rescind, terminate or amend any such voting trust agreement, make consents, directly or through a committee or agent, to any recapitalization, reorganization, consolidation, merger, dissolution or liquidation of any corporation, partnership or association in which any Trust created hereunder may have an interest, and may make any payments, assignments, or subscriptions and take any other steps which the Trustees may deem necessary or proper to enable the Trust created hereunder to obtain the benefits of any such transaction.

6.6 Insurance. The Trustees may effect and keep in force life, fire, rent, title, liability or casualty insurance or any other insurance of any nature in any form and in any amount, including without limitation, insurance on or with respect to any dwelling and the contents thereof in which any beneficiaries reside and any automobile which any beneficiary uses, whether or not such dwelling, contents or automobile are part of the Trust Estate.

6.7 Principal and Income. The Trustees may determine what is principal or income of any trust and apportion and allocate in their discretion its receipts, taxes and other expenses and charges between the two. A separate income account need not be maintained. Any income not distributed in accordance with the provisions hereof shall become principal.

6.8 Alternative Valuation Date and Tax Choices. The Trustees, in selecting the valuation date for purposes of Federal estate and state death taxes, may select a date which results in the lowest tax burden on the Undersigned's estate, considering the effect of the Federal estate tax and all state death taxes, and also income tax of the property included in the Undersigned's estate and the same shall be binding upon all such beneficiaries, without further adjustment to any share or portion due a beneficiary. Trustees may also choose between taking certain deductions, or both. The Trustees shall not restore to principal from income the amount by which the Federal estate taxes are increased by the estate's loss of any such deductions.

6.9 Settlement of Claims. The Trustees shall have power to renew, assign, alter, extend, compromise, release, with or without consideration, or submit to arbitration, obligations or claims held by or asserted against the Trust Estate.

6.10 Income and Gift Taxes. The Trustees shall have power to join with the surviving spouse in federal and state income tax returns for any period prior to the first of the Undersigned's death; and also for federal gift tax purposes, to consent to the splitting of gifts made by the Undersigned to third persons so that such gifts may be treated for the purpose of computing gift tax or refunds, including deficiencies, interest and penalties as they result from so doing, even though not attributable to the Undersigned's own income or property, and even to determine that all sums so payable shall be paid out of the Undersigned's Trust Estate, without giving or obtaining any consideration therefor.

6.11 Trustee Transactions with Other Family Trusts or Estates. The Trustees may enter into any transactions authorized by this Article with any other decedent's estate or any inter vivos or testamentary trust in which the Undersigned or issue or any of them has beneficial interest, even though any fiduciary of such other estate or trust is also a fiduciary under this Trust or the Undersigned's Will. The Trustees may enter into any transaction authorized by this Article with the Trustees or legal representatives of any

other trust or estate in which any beneficiary hereunder has a beneficial interest even though such Trustee or legal representative is also a Trustee hereunder. Without limiting the generality of the foregoing, the Trustees may advance funds to, purchase assets from, or sell assets to the personal representatives of the estate of the Undersigned and may pay, with or without arrangements for reimbursement, any sums necessary for the settlement of the estate of the Undersigned subject to Section 4.3.

6.12 Reserves for Amortization, Obsolescence, Depreciation and Depletion. The Trustees may charge to operating expense all current costs of amortization, obsolescence, depreciation and depletion of any properties of the Trust and provide adequate reserves for such amortization, obsolescence, depreciation and depletion.

6.13 Agents. The Trustees may hold investments in the name of a nominee and may employ custodians of any Trust property, brokers, agents and attorneys.

6.14 Distribution in Kind. The Trustees may make any distribution or payments in kind, or cause any shares to be composed of cash, property or undivided fractional interests in property different in kind from any other share and determine the value of such shares. The Trustees may acquire assets for distribution in kind to the beneficiaries hereunder. Such assets may include property, real and personal, stocks, bonds, notes and other securities, life insurance contracts and annuities.

6.15 Trustees Expenses. The Trustees may pay from either income or principal of the Trust the expenses of administering the same. The Trustees shall have a lien on the Trust Estate from either principal or income or from both, all advances made for the benefit or protection of the Trust Estate or its properties and all expenses, loss and liabilities not resulting from the negligence or other default of the Trustees incurred in connection with the administration of the Estate.

6.16 Payments to Minors or Disabled Beneficiaries. If, in the Trustees discretion, any beneficiary (whether under or over age 25) is incapable of making proper disposition of any sum of income or principal that is payable or appointed to said beneficiary under the terms of this Trust Agreement, the Trustees may apply said sum to or on behalf of the beneficiary by one or more of the following methods: (i) by payment on behalf of the beneficiary to any one with whom the beneficiary resides; (ii) by payments in discharge of the beneficiary's bills or debts, including bills for premiums on insurance policies; or (iii) by paying an allowance to the beneficiary directly. The foregoing payments shall be made without regard to other resources of the beneficiary, and without the intervention of any guardian or like fiduciary; provided, however, that the Trustees shall endeavor to apply the funds for the benefit of the beneficiary, that the funds will not be used by any adult person, or any other person for a purpose other than the

direct benefit of the beneficiary, and particularly so that said funds will not be diverted from the purpose of support and education of the beneficiary.

6.17 Trustees May Rely on Will. In ascertaining whether there has been an amendment of this Trust by the Last Will and Testament of the Undersigned or whether there has been an exercise of any powers which have been granted to any of the beneficiaries herein and which may be exercised by any such beneficiary's Last Will and Testament, the Trustees shall be protected in relying upon an instrument admitted to probate in any jurisdiction as the Last Will and Testament of the Undersigned or as the Last Will and Testament of any beneficiary who has such power. Unless the Trustees have actual notice of the admission to probate of such a Will within six (6) months after the death of the Undersigned or any such beneficiary, it will be conclusively presumed that no such Will has been admitted to probate, and no such Will exists, and that the Undersigned or beneficiary, as the case may be, died intestate and the Trust Estate shall be administered accordingly, whether or not such Will is thereafter found to exist.

6.18 Commingling. The Trustees may commingle the funds and assets of any Trust Estate hereunder with any other Trust Estate created hereunder so long as proper records are kept of the assets allocable to any such trust. The Trustees shall not be required to physically divide any of the investments or any other property unless necessary or deemed advisable for the purpose of distribution, but may keep the same or any part hereof in one or more funds in which the separate and distinct trust or shares or fraction shall have undivided interests.

6.19 Parties Dealing With the Trustees. No purchaser, and no issuer of any stock, bond or other person dealing with the Trustees hereunder with respect to any properties hereunder as a purchaser, lessee, party to a contract or lease, or in any other capacity whatsoever, shall be under any obligation whatsoever to see to the disbursing of monies paid to the Trustees or to the due execution of this Trust in any particular, but such person shall be absolutely free in dealing with the Trustees on the same basis as though the Trustees were the absolute owners of said property, without any conditions, restrictions or qualifications whatsoever.

6.20 Trustees Liability. No successor Trustee shall be held liable for any mistakes, negligence or willful misconduct of any preceding Trustee. Without limiting the generality of the foregoing, no Trustee shall be held liable for failing to make detailed examinations of the actions or accounts of any preceding Trustee unless such improper actions of the preceding Trustee are brought to the attention of the successor Trustee. An honest, non-negligent error of judgment shall never be cause of liability of any Trustee. The heirs of the Undersigned while serving as Trustees shall be liable only for willful fraud. Other Trustees shall be liable for their acts and omissions in accordance with the laws of the State of Utah.

6.21 Limitations on Power of Individual Trustees. Notwithstanding specific provisions in this instrument to the contrary, and individual serving as a Trustee shall have no voice or power in the determination of distributions of principal (including trust terminations) or accumulations of income for said individual Trustees, or to or for any person to whom said individual Trustees owes a legal obligation of support, nor shall said individual fiduciary have any voice or power in any other determination which would cause Trust principal to be includible in such individual's estate for tax purposes or which would cause Trust income to be taxed to such individual, but such determinations shall be made in the sole discretion and at the direction of any Co-Trustee or successor Trustees. Even though any successor Trustees are not then serving full time, they shall serve as a Trustee for this limited purpose.

6.22 Miscellaneous Trustee Provisions. In order to carry out the provisions of the Trusts created by this instrument, the Trustee shall have the following powers, in addition to those now or hereafter conferred by law, such powers to be exercised in good faith and in accordance with the Trustees' fiduciary obligations:

(a) To lend money to any person, including the probate estate of the Undersigned, provided that any such loan shall be adequately secured and shall bear a reasonable rate of interest.

(b) To purchase property at its fair market value as determined by the Trustees in the Trustees' discretion, from the probate estate of the Undersigned.

(c) To borrow money on such terms and conditions as the Trustees consider advisable, and to encumber Trust property by mortgage, deed of trust, pledge or otherwise for the debt of the Trust or a Co-owner of Trust property.

(d) To commence or defend, at the expense of the Trust, such litigation with respect to the Trust or any property of the Trust Estate as the Trustees consider advisable, and to compromise or otherwise adjust any claims or litigation against or in favor of the Trust.

(e) To withhold from distribution in the Trustees' discretion, at the time for distribution of any property in this Trust, without payment of interest, all or any part of the property, as long as the Trustees, in their discretion, shall determine that such property may be subject to conflicting claims, to tax deficiencies, or to liabilities, contingent or otherwise, property incurred in the administration of the Estate.



(f) To purchase bonds and to pay such premiums in connection with the purchase as the Trustees, in their discretion, consider advisable; provided, however, that each premium shall be repaid periodically to principal out of the interest on the bond in such reasonable manner as the Trustees shall determine and, to the extent necessary, out of the proceeds on the sale or other disposition of the bond.

(g) To purchase bonds at such discount as the Trustees in their discretion consider advisable; provided, however, that the discount shall be accumulated periodically as interest in such reasonable manner as the Trustees shall determine, and to the extent necessary paid out of the proceeds on the sale or other disposition of the bond or out of principal.

(h) To purchase, in the Trustees discretion, at less than par, obligations of the United States of America issued before March 4, 1971, that are redeemable at par in payment of any federal estate tax liability of the Undersigned, in such amounts as the Trustees deem advisable. The Trustees shall exercise the Trustees' discretion and purchase such obligations if the Trustees have reason to believe that the Undersigned is in substantial danger of death, and may borrow funds and give security for that purpose. The Trustees shall resolve any doubt concerning the desirability of making the purchase and its amount in favor of making the purchase and in purchasing a larger, even though somewhat excessive, amount. The Trustees shall not be liable to the Undersigned, any heir of the Undersigned, or any beneficiary of this Trust for Losses resulting from purchases made in good faith. The Trustees are directed to redeem any such obligations that are part of Trust corpus to the fullest extent possible in payment of the federal estate tax liability of the Undersigned.

6.23 Income accrued or unpaid on trust property when received into the Trust shall be treated as any other income. Income accrued or held undistributed by the Trustees at the termination of the Trust created herein shall go to the next beneficiaries of the Trust in proportion to their interest in it. Among successive beneficiaries of this Trust, all taxes and other current expenses shall be prorated over the period to which they relate on a daily basis.

6.24 Notwithstanding anything herein to the contrary, during the lifetime of the surviving spouse of the Undersigned, said spouse shall have the power to require the Trustees to make all or part of the principal of the Marital Trust productive or to convert promptly any unproductive part into productive property. This power shall be exercised by the surviving spouse of the Undersigned in a written instrument delivered to the Trustees.

6.25 Notwithstanding anything to the contrary, it is the Undersigned's intention to have the Marital Trust qualify for the marital deduction under Section 2056 of the Internal Revenue Code and the regulations pertaining to that Section or any corresponding or substitute provisions applicable to the Trust estate. In no event shall the Trustee take any action or have any power that will impair the marital deduction, and all provisions regarding the Marital Trust shall be interpreted to conform to this primary objective.

6.26 For each trust which is otherwise to be established under this Trust instrument and to which any of the Undersigned's generation-skipping exemption is allocated, unless the trust thereby has a generation-skipping inclusion ratio of zero, the Trustee shall instead establish two separate trusts so that each separate trust has a generation-skipping inclusion ratio of either zero (the Exempt Trust) or one (the Nonexempt Trust). This is to be accomplished by allocating to the Nonexempt Trust the minimum amount of property necessary to establish that trust with an inclusion rate of one, while leaving the Exempt Trust with an inclusion ration of zero.

## ARTICLE VII

### TRUSTEE PROVISIONS

7.1 Accounting. With respect to each separate Trust created herein, any corporate Trustee shall render at least annually an account of income and principal, including a statement of all receipts, disbursements and capital changes, to all beneficiaries then eligible to receive income or to the natural or legal guardians of such beneficiaries. However, individual Trustees shall render such annual accounting only if requested by at least one beneficiary of the Trust, and as need for tax returns. So long as the Undersigned serves as a Trustee of this Trust, an counting requested by beneficiaries of this Trust shall be limited to a list of assets currently held by the Trustees as part of this Trust. Any time a Trustee resigns, is removed or dies in accordance with Sections 6.5 and 6.10, then the resigning Trustees, the removed Trustees, or the surviving Co-Trustee or successor Trustee, in case of death of a single Trustee, shall submit an accounting to all the living beneficiaries of the Trust who shall object in writing to said Trustee's accounting within sixty (60) days of said accounting shall be deemed approved by the beneficiaries.

7.2 Acting in Other Jurisdictions. If for any reason the Trustee is required or deems it advisable to take any actions in any jurisdiction in which it is not permitted under the laws of such jurisdiction to qualify as a Trustee, the Trustee may appoint to act in such other jurisdiction such person or corporation as the Trustee deems advisable.

7.3 Bond. No bond shall be required of the original Trustees hereunder or of any successor Trustees or, if bond is required by law, no surety on such bond shall be required.

7.4 Compensation. Any individual Trustee shall serve as Trustee without compensation; however, a reasonable compensation shall be paid if the individual Trustee so requests by a writing attached to this Trust, and when a copy of such request is delivered to the then existing income beneficiaries. Any corporate Trustee shall be entitled to a reasonable fee for its services commensurate with fees charged by the Trustees for similar services. Any corporate Trustee may charge a reasonable fee for transfers to a successor Trustee and for any final distribution of any share of the Trust Estate based upon the work involved in such transfer or final distribution.

7.5 Resignation. Any Trustee may resign by giving thirty (30) days written notice to all of the then current, adult, competent beneficiaries of any Trust created hereunder.

7.6 Trustees. The following will act as original Trustees, and as replacement Trustees in the following order of succession:

(a) Darlene Patterson and Rex E. Patterson, jointly as original Co-Trustees. If either shall fail or cease to serve, then the survivor shall serve alone.

(b) Judy Ann Henry, Vicky D. Romero, to serve jointly. If either shall fail or cease to serve, then the other shall serve with the next listed Trustee, so that there are always two individuals serving jointly.

(c) Rex A. Patterson

(d) Trustee or Trustees as the majority of the beneficiaries remaining choose, with the parent or legal guardian voting for minor beneficiaries. There must always be at least two Trustees serving jointly.

In the discretion of the Trustees, additional Trustees may be added in the succession above indicated if more than one trustee is desired. If an institutional trustee is appointed Trustee, then no successor Trustee to said institution need be appointed.

An exception to the above has to do with the Trusts which are established as lifetime trusts for the benefit of the children of the Undersigned. At such time as both the Undersigned and the Undersigned's spouse have died, and at such time as each child of the Undersigned who is a Trust beneficiary attains age 40, then the Trustee of the Trust established for each such child shall be the child who is the beneficiary of each respective

Trust if said child elects to be Trustee. By way of example, on the death of the Undersigned and the Undersigned's spouse, the Trustee for the benefit of the Trust to be established for Gary E. Patterson shall be Gary E. Patterson, if he elects and if he is at least age 40 or when he becomes age 40. If any of the above children cease to serve as trustee, then a successor trustee shall be appointed as described above except that each said child may require trustees on said child's trust once said child is age 40.

7.7 Dissent Among Trustees. A majority of the Trustees, whether individual or corporate, shall have the power to make any decisions, undertake any action, or execute any documents affecting the Trust created herein. In the event of a difference of opinion among the Trustees, the decision of the majority of them shall prevail, but the dissenting or non-assenting Trustee shall not be responsible for any action taken by the majority pursuant to such decision. After the death of the Undersigned, if only two (2) individual Trustees are in office, they must act unanimously. If an individual and a corporate Trustee are in office, the determination of the individual Trustee shall be binding.

7.8 Delegation of Authority. Any Trustee may from time to time delegate to one or more of the remaining trustees, any powers, duties or discretions. Every such delegation shall be in writing delivered to the delegate or delegates, and shall remain effective for the time therein specified or until earlier revocation by a further writing similarly delivered. Everyone dealing with the Trustees shall be absolutely protected in relying upon the certificate of any Trustee as to who is the acting Trustee or Trustees at the time and as to the extent of their authority by reason of any delegation or otherwise.

7.9 Independence of Court Supervision. In the absence of a breach of trust, no Trustee shall ever be required to qualify before, be appointed by, or account to any court or obtain the order or approval of any court in the exercise of any power of discretion herein given.

7.10 Removal. While the surviving spouse of the Undersigned is a Trust beneficiary under this Trust, said spouse shall have the power to require any existing Trustee to resign, whereupon a successor Trustee shall be appointed as appointed by said spouse, or if the spouse does not appoint a successor then a successor shall be appointed pursuant to paragraph 7.6.

## ARTICLE VIII

### GENERAL TRUST PROVISIONS

#### 8.1 Insurance

8.101 Power of the Undersigned. The Undersigned reserves the right, without the consent or approval of the Trustees, to sell, assign or hypothecate any policies of life or accident insurance made payable to the Trustees hereunder, to exercise any option or privilege granted by such policies, including but without limiting the generality of the foregoing, the right to change the beneficiaries of such policies, and to receive all payments, dividends, surrender values, benefits or privileges of any kind which may accrue on account of such policies during the Undersigned's lifetime. Furthermore, the Trustees agree to deliver to the Undersigned any of such policies deposited with the Trustees hereunder.

8.102 Duties of Trustees. The Trustees shall hold any policies of life or accident insurance which may be deposited with the Trustees, but without any obligation to pay premiums, assessments or other charges upon any of the policies or otherwise to preserve them or any of them as binding contracts of insurance. Upon the death of the insured, or upon the maturity date of any policy assigned or payable to the Trustees, the Trustees shall take such proceedings in their judgment they shall deem necessary to collect all proceeds due on the policies and they may, if they so elect, exercise any settlement options available under the policies. The Trustees are authorized to compromise and adjust claims arising out of such insurance policies, upon such terms and conditions as the Trustees shall deem advisable, and, to the extent necessary, may maintain or defend any dispute; provided, however, the Trustees shall be under no duty to maintain or enter into any litigation unless their expenses, including attorneys fees and costs, have been advanced or guaranteed in an amount and in a manner reasonably satisfactory to the Trustees. The Trustees may repay any advances out of the principal or income of this Trust. The receipt of the Trustees to the insurer shall be a full discharge of the insurer and the Trustees alone shall thereafter be required to see to the application of the proceeds.

8.2 Spendthrift Clause. The interest of each beneficiary in the income or principal of any Trust created hereunder shall be free from the control or interference of any creditor of the beneficiary or any spouse of a married beneficiary and shall not be subject to attachment or susceptible of anticipation or alienation. Nothing contained in this Section shall be construed as restricting in any way the exercise of any power or discretion granted hereunder.

8.3 Perpetuity Savings Clause. In any event, and anything to the contrary herein contained notwithstanding, the Trusts created in this Agreement shall terminate upon the day of twenty-one (21) years after the death of the Undersigned and the Undersigned's children and grandchildren living at the time this Trust becomes irrevocable, in the event these Trusts shall not have previously terminated in accordance with the terms hereof. In the event of the termination of these Trusts as provided for in this Section, the Trustees shall distribute to the Trust Estate as it shall then be constituted, together with any net income, to the beneficiaries then entitled to the income from the Trust Estate, in the same proportion in which they are entitled to such income.

8.4 Governing Law. This Agreement shall be construed as regulated by the laws of the State of Utah.

8.5 Definitions. The following are various terms used in the Trust Agreement and the definitions which the Undersigned intends for such terms:

(a) Children. "Children" means the lineal descendants in the first degree of the Undersigned or of such other persons specifically named or indicated by the text or context. "Child" means a single such descendent. The Undersigned intends, for all purposes whatsoever, adopted children of the Undersigned or any other person shall have exactly the same status as natural born children; provided, however, adopted children shall be treated as natural children only if the adoption occurs before the adopted person's 21st birthday. Provided further, however, adopted issue who are also natural issue shall take only in one capacity, such capacity being the one which grants to such issue the larger share.

(b) Issue. "Issue" means children and other lineal descendants of the Undersigned or of such other persons specifically named or indicated by the text or context.

(c) Child in Being. A child who is born alive shall be treated as a child in being during the actual period of gestation for purposes of (i) determining if a person (that is, the Undersigned or any other person) died without children or issue surviving; and (ii) determining if a person is entitled to share in a distribution of Trust principal. All of the rights of such a child shall commence at birth.

(d) "Spouse", "Surviving Spouse", or "Spouse of the Undersigned", shall be deemed to refer to Rex E. Patterson.

8.6 Invalid Provisions. If any provision of this Trust is held invalid, none of the other provisions shall thereby be rendered invalid or inoperative, but such provisions shall be given full force and effect as herein provided.

8.7 Survivorship. In determining the beneficiaries of the Trust created herein, a beneficiary shall be deemed to have survived the Undersigned, or any other person, a point in time, or an event, as the case may be, only if such survivorship is for at least thirty (30) days. Provided, however the preceding sentence shall not apply in any case where its application would cause an otherwise valid provision of this Trust to be void because of the rule against perpetuity, the rule limiting suspension of the power of alienation, the rule against accumulation, or any similar rules.

8.8 Age. A person attains a specific age (for example, age 21) at the beginning of the day that forms the coordinate birthday commemoration (for example, 21st birthday). Any person whose birthday falls on February 29 shall be deemed to have a birthday on February 28 for all purposes of this Trust.

8.9 Number and Gender. The singular shall be interpreted as the plural and vice-versa, if such treatment is necessary to interpret this Trust in accordance with the manifest intention of the Undersigned. Likewise, if either the feminine, masculine or neuter gender should be one of the other genders, it shall be so treated.

8.10 Paragraph Headings. The paragraph and other headings used herein are merely indices for convenience and shall not be used in the interpretation of this instrument.

8.11 Notification of Attorney. If the Undersigned has a serious illness or operation, the Undersigned requests that the Trustees contact their attorney, Mark D. Palmer, to obtain instructions in case the Undersigned should die.

IN WITNESS WHEREOF, the Undersigned has executed this Trust Agreement.

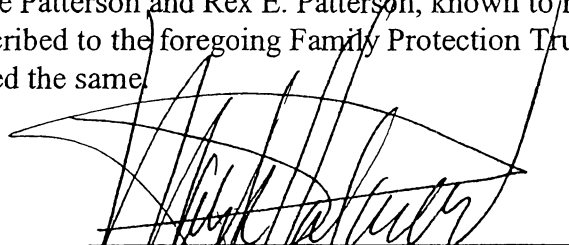
  
DARLENE PATTERSON, Undersigned

  
DARLENE PATTERSON, Co-Trustee

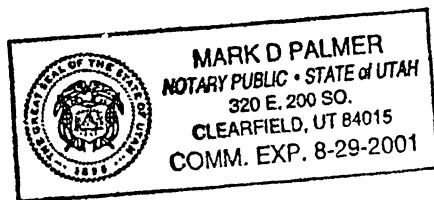
  
REX E. PATTERSON, Co-Trustee

STATE OF UTAH                    )  
  ( ss.  
COUNTY OF DAVIS                )

On the 30th day of July, 1999, personally appeared before me a Notary Public in and for said County and State, Darlene Patterson and Rex E. Patterson, known to me to be the persons whose names are subscribed to the foregoing Family Protection Trust, and acknowledged to me that they executed the same.

  
\_\_\_\_\_  
NOTARY PUBLIC  
Residing at: Syracuse, Utah  
My Commission Expires: 08/29/01

(SEAL)





SCHEDULE "A"

SEPARATE PROPERTY OF THE  
DARLENE PATTERSON  
FAMILY PROTECTION TRUST

FOR TEN DOLLARS (\$10.00), and other good and valuable considerations, the Undersigned, as Grantor, hereby transfers, sells, assigns, and conveys the below listed property with all right, title, interest and obligations pertaining thereto, to the Trustees, subject to the terms and conditions of The Darlene Patterson Family Protection Trust, dated the 30th day of July, 1999.

<u>PROPERTY DESCRIPTION</u>	<u>DATE PLACED INTO TRUST</u>	<u>GRANTOR'S INITIALS</u>
1. Any and all personal property now owned or hereafter acquired by the Undersigned.	7/13/99	D.P.
2.		
3.		

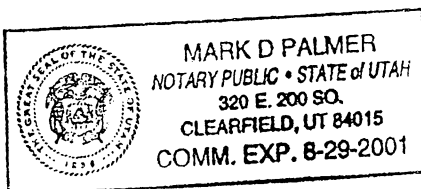
Darlene Patterson  
DARLENE PATTERSON

STATE OF UTAH )  
( ss.  
COUNTY OF DAVIS )

On the 30th day of July, 1999, personally appeared before me Darlene Patterson, whose name is subscribed to the foregoing Schedule "A", and acknowledged to me that she executed the same.

[Signature]  
NOTARY PUBLIC  
Residing at Syracuse, Utah  
My Commission Expires: 08/29/01

(SEAL)



We hereby certify that we have read the foregoing Trust and that it correctly states the terms and conditions under which the Trust estate is to be held, managed, and disposed of by the Trustees. We approve the declaration of Trust in all particulars and request the Trustees to execute it.

We further state that any properties transferred to this Trust which constitute community property pursuant to the laws of any community property state having jurisdiction over such property, then such property shall retain its character as community property while held in said Trust until the earlier of the date of the death of the person who created this Trust, or said person's spouse. In addition, if any property is removed from this Trust such property shall continue to maintain its character as either community or separate property depending upon what kind of property it is.

Darlene Patterson  
DARLENE PATTERSON

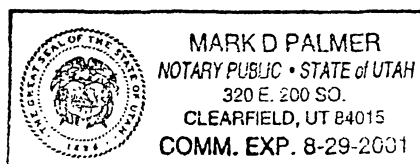
Rex E. Patterson  
REX E. PATTERSON

STATE OF UTAH                    )  
  ( ss.  
COUNTY OF DAVIS            )

On the 30th day of July, 1999, personally appeared before me Darlene Patterson and Rex E. Patterson, known to me to be the persons who executed the foregoing instrument.

[Signature]  
NOTARY PUBLIC  
Residing at: Syracuse, Utah  
My Commission Expires: 08/29/01

(SEAL)



Tab G

**FIRST AMENDMENT TO THE  
DARLENE PATTERSON  
FAMILY PROTECTION TRUST**

This First Amendment to the Darlene Patterson Family Protection Trust is made and entered into this 31st day of May, 2000, by and between Darlene Patterson, the Undersigned and Darlene Patterson, Trustee.

Darlene Patterson, pursuant to the authority granted in the Darlene Patterson Family Protection Trust, does hereby amend said Trust as follows:

1. Article V, of the original Darlene Patterson Family Protection Trust is hereby amended to add a Section 5.202 to read as follows:

5.202 Specific Distribution. Notwithstanding the other provisions of this Article V, regarding equal shares to children, the Trustees shall distribute to Ronald S. Patterson the five acre portion of the property in Davis County identified as Serial #14-040-0067. Such portion shall be five acres only (from this 14.34 acre parcel), and shall be the approximately five acres located in closest proximity to the North side of Ronald S. Patterson's home. This is a specific devise and shall not alter or otherwise diminish the share of the balance of the Trust Estate to be distributed to Ronald S. Patterson.

2. Except as specifically herein amended, I hereby ratify and confirm the Darlene Patterson Family Protection Trust dated the 30<sup>th</sup> day of July, 1999.

IN WITNESS WHEREOF the Undersigned and Trustees have executed this First Amendment to the Darlene Patterson Family Protection Trust the day and year first above written.

UNDERSIGNED:

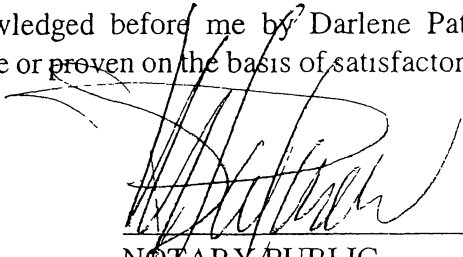
  
DARLENE PATTERSON

TRUSTEE:

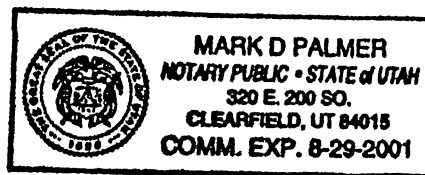
  
DARLENE PATTERSON

STATE OF UTAH                    )  
  ( ss.  
COUNTY OF DAVIS                )

Subscribed, sworn to and acknowledged before me by Darlene Patterson, the  
Undersigned whose identity is known to me or proven on the basis of satisfactory evidence,  
this 31st day of May, 2000.

  
\_\_\_\_\_  
NOTARY PUBLIC  
Residing at: Syracuse, Utah  
My Commission Expires: 08/29/01

(SEAL)



# EXHIBIT H

RESTATEMENT OF  
THE DARLENE PATTERSON FAMILY PROTECTION TRUST

I, the Trustor, Darlene Patterson, hereby amend and restate in full The Darlene Patterson Family Protection Trust dated July 30, 1999 and signed by me as Trustor and Trustee. This Restatement shall be effective as of the date of its execution.

ARTICLE I  
TRANSFER INTO TRUST

A. Transfer of Property. For valuable consideration, I, the Trustor, Darlene Patterson, of West Point, Utah, hereby transfer and deliver to the Trustee and the successor Trustees the property listed in the Property List (Schedule A), annexed hereto and incorporated herein by reference. The Trustee is to hold the property, and any other property which the Trustee may at any time hereafter hold or acquire, for the uses and purposes and upon the terms and conditions set forth herein. All of such property is referred to collectively as the "Trust Estate."

B. Present and Future Property. It is specifically my intention that all real and personal properties now owned and later acquired by me are to automatically be a part of this Trust. I, or any other person, may grant to the Trust additional real and personal property. However, the Trustee may decline to accept such property by sending written notice of nonacceptance to such grantor by first class mail addressed to the last known address of such grantor or delivered to such grantor in person.

## ARTICLE II

### REVOCATION AND AMENDMENT

I reserve the right to amend or revoke this Trust in whole or in part. Such amendment or revocation shall be by written instrument and shall be effective upon the signing thereof by me without notice to any successor Trustee. At my death this Trust shall be an irrevocable trust and will be administered and distributed as set forth herein. While this Trust remains revocable, I reserve the right to make such use of the funds and properties of the Trust as I may deem prudent. Such use shall be deemed to have been made with the consent and approval of the Trustee.

## ARTICLE III

### LOCATION OF DOCUMENTS

This Trust has been prepared in duplicate, each copy of which has been executed as an original. One of these executed originals is in my possession. I have deposited the other original for safekeeping with my attorney, David Ray Carver, at his office in Kaysville, Utah. Either of these copies may be used as an original without the other. If only one copy of this Trust Agreement can be found then it shall be considered as the original and the missing copy will be presumed inadvertently lost.

## ARTICLE IV

### ATTORNEY NOTIFICATION

If I have a serious illness or operation, I request that the Trustee call my attorney, David Ray Carver, to obtain instructions concerning this Trust. If my death makes this prior



conversation impossible then the Trustee should call the attorney as soon after my death as is possible.

## ARTICLE V

### GENERAL PROVISIONS

A. Certified Copies. To the same effect as if it were the original, any person or institution may rely upon a copy certified by a Notary Public to be a true copy of this Agreement and any schedules or exhibits attached hereto.

B. Present Interests. The interest of the beneficiaries is a present interest which shall continue until this Trust is revoked or terminated.

C. Spendthrift Provision. After any of the trusts created herein becomes irrevocable, the interests of each beneficiary in income and principal of the trust shall be free from the control or interference of any creditor of such beneficiary, the spouse of a married beneficiary, and the parent of a child beneficiary, and shall not be subject to attachment or assignment either voluntarily or involuntarily.

D. Rule Against Perpetuities Savings Clause. In any event, this Trust shall terminate not later than twenty-one (21) years after the death of the last survivor of the group composed of me and those of my descendants living at my death. The property held in trust shall be discharged of any trust and shall immediately vest in and be distributed to the persons then entitled to the

~~income. For this purpose only it shall be presumed that any person entitled to receive any~~

discretionary payments from the income or principal of any particular trust is entitled to receive the full income and that any class of persons so entitled is entitled to receive all such property, to

be divided among them equally per stirpes. No power of appointment granted hereunder shall be so exercised as to violate any applicable Rule Against Perpetuities, accumulations, or any similar rule or law. Any attempted exercise of any power which violates such rule or law shall be void, notwithstanding any provision of this Trust to the contrary.

E. Trust Contest. If any beneficiary under this Trust shall, directly or indirectly, contest this Trust or any of its respective parts or provisions, any share or interest given to that beneficiary shall be revoked and augment proportionately the shares of the beneficiaries that have not joined or participated in the contest.

F. Invalidity. If any provision of this Trust Agreement is unenforceable, the remaining provisions shall, nevertheless, be carried into effect.

G. Gender. In all provisions of this Trust Agreement, the masculine includes the feminine and the neuter and vice versa. Where applicable, the singular includes the plural and vice versa.

H. Natural and Adopted. Whenever used herein, the terms "issue," "child," "children" and "descendants" include those natural and adopted. The term descendants means the same as the term issue.

I. Jurisdiction. This Agreement shall be construed and regulated by the laws of the State of Utah.

## ARTICLE VI

### TRUSTEE PROVISIONS

A. Parties Dealing with Trustee Protected No purchaser or issuer of any stock, bond or other instrument evidencing a deposit of money or property, or other person dealing with the

Trustee with respect to any property hereunder, shall be under any obligation to see to the disbursing of money or other property delivered to the Trustee or to the due execution of this Trust in any particular. Such persons shall be absolutely free in dealing with the Trustee as though the Trustee were the absolute owner of the property. Everyone dealing with the Trustee shall be absolutely protected in relying upon the certificate of any Trustee as to the extent of the Trustee's authority by reason of any delegation or otherwise.

B Insurance. In the event the Trust is named a beneficiary under any policy of insurance, the Trustee shall hold the policy, subject to order of the owner of the policy. The Trustee shall have no obligation regarding any insurance policy other than the safekeeping of any policy which may be delivered to the Trustee. The owner of the policy retains all rights, options and privileges with respect to the policy. Upon proof of death of the insured, or upon maturity of the policy prior to the death of the insured, the Trustee shall use reasonable efforts to collect all sums payable on the policy for which the Trust is designated a beneficiary or owner. All insurance proceeds received by the Trustee shall become principal of the Trust Estate, except interest paid by the insurer, which shall be classed as income.

C. Bond. No Trustee named herein need give bond in any jurisdiction. If a fiduciary's bond may not be dispensed with, I request that the bond be accepted without surety and in the lowest possible amount.

D Majority Decision. Whenever more than one Trustee is designated to act concurrently, a majority of the Trustees shall have the power to make any decision, undertake any action, or execute any documents affecting the trusts created herein. In the event of a difference of opinion among the Trustees, the decision of the majority of them shall prevail, but a dissenting

Trustee shall not be responsible for any action taken by the majority pursuant to such decision. If only two individual Trustees are in office, they must act unanimously. If an individual and a corporate Trustee are in office, the determination of the individual Trustee shall be binding.

E. Prior Trustee Misfeasance. No successor Trustee shall be liable for any misfeasance of any prior Trustee.

F. Resignation. Any Trustee may decline to act or may resign as Trustee of any trust by delivering a written resignation to the beneficiaries thereof.

G. Delegation. Any Trustee may, from time to time, delegate to any remaining Trustee any powers, duties or discretions. Every such delegation shall be in writing and delivered to the delegate or delegates. The delegation shall remain effective for the time specified therein or until earlier revoked. Such revocation shall be in writing and delivered to the delegate or delegates.

H. Trust Expenses. From the income of the trusts or, if that is insufficient, from the principal thereof, the Trustee shall pay and discharge all expenses incurred in the administration of the trusts.

I. Compensation. The Trustee shall be entitled to reasonable compensation for services rendered by the Trustee or counsel retained by the Trustee, including services in connection with the transfer of assets to beneficiaries or a successor Trustee and the appointment of a successor Trustee.

J. Annual Accounting. With respect to each trust created herein, the Trustee shall render at least annually an account of income and principal, including a statement of all receipts, disbursements and capital changes, to all beneficiaries then eligible to receive income, or to the natural or legal guardians of such beneficiaries.

## ARTICLE VII

### POWERS OF THE TRUSTEE

The Trustee shall have full power to do everything in administering the trusts that the Trustee deems to be for the best interests of the beneficiaries including, but not limited to, the following:

A. Investments. To buy, sell and trade in securities. To maintain and operate accounts with brokers. To pledge any securities held in trust as security for loans and advances. To buy, sell and trade personal property, real estate, and interests therein, including business interests and investments, all without diversification as to kind or amount, without being limited to investments authorized by law for the investment of trust funds. To hold or take title to property in the name of a nominee.

B. Sell Property. To sell, exchange, pledge, or otherwise dispose of any real or personal property in such manner and upon such terms as the Trustee deems appropriate.

C. Distributions in Kind. To make distributions as authorized in this Trust Agreement, including distributions to the Trustee, in kind or in money or partly in each, even if shares are composed differently. For such purposes, the valuation of the Trustee shall be given effect if reasonable.

D. Distributions to a Special Need Beneficiary. The Trustee may, in the sole discretion of the Trustee, distribute personal property items to a minor before any age limitations outlined in this Trust unless expressly provided otherwise. In addition, if the Trustee, in the sole discretion of the Trustee, determines that any beneficiary (whether a minor or of legal age) is incapable of making proper disposition of any sum of income or principal that is payable or appointed to the

beneficiary, the Trustee may apply the sum on behalf of the beneficiary by any of the following methods:

1 By payments on behalf of the beneficiary to a parent, custodian, guardian, or an adult person with whom the beneficiary resides. The Trustee shall not be liable for any such payments made.

2. By payments in discharge of the beneficiary's debts or obligations.

3. By paying an allowance to the beneficiary directly.

E. Adjustments between Income and Principal To determine whether and to what extent receipts should be deemed income or principal, whether and to what extent expenditures should be charged against income or principal, and what other adjustments should be made between income and principal. Such determinations shall be within the well-settled rules therefore.

F Agents. To delegate powers to agents, remunerate them and pay their expenses, including accountants, investment counsel, appraisers, legal counsel, and other experts. To employ custodians of the trust assets, bookkeepers, clerks and other assistants.

G. Legal Documents and Claims. To execute contracts, deeds, agreements or any other documents which the Trustee deems necessary or desirable. To assign, alter, compromise, release, with or without consideration, or submit to arbitration or litigation, obligations or claims held by or asserted against the Trustee, my agents, or the trust assets.

H. Borrow Money. To borrow money for the payment of taxes, debts or expenses, or for any other purpose which, in the opinion of the Trustee, will facilitate the administration of any trust created herein. To pledge or mortgage property as security for any such loans. To pay

O. Trustee as Interested Party. To exercise all the foregoing powers even though the Trustee is personally interested in the property that is involved, notwithstanding any rules of law relating to divided loyalty or self-dealing.

## ARTICLE VIII

### DISPOSITION DURING MY LIFETIME

During my lifetime, the Trustee shall hold, manage, and invest the Trust Estate, collect the income, and dispose of the net income and principal as follows:

A. Income and Principal. The Trustee shall pay to me all of the net income of this Trust at least semiannually. The Trustee may pay or apply for my use and benefit such amounts of the principal as the Trustee deems necessary or advisable.

B. Competency. I shall continue to be deemed mentally competent unless determined not to be competent in writing by two physicians selected by the successor Trustee. The physicians shall not be liable for any determination made as to my competency if the determination is made in a reasonable manner.

C. Incapacity. If, in the Trustee's judgment, I am so incapacitated by reason of illness, age, or other cause that I am incapable of handling funds for my own use and benefit, or if I am unable to give prompt attention to my financial affairs, the Trustee may use so much of the net income and principal as the Trustee deems necessary or advisable:

1. For my comfort, support, maintenance, health and education and any person who, in the judgment of the Trustee, is dependent upon me.

2. For the discharging of any debt or obligation incurred by me and believed by the Trustee to be a valid debt including home rental and mortgage payments, utilities, installment obligations, insurance premiums and established charitable contribution customs.

## ARTICLE IX

### DISPOSITION AT MY DEATH

At my death, after payment of currently due debts, expenses and costs of last illness and funeral out of the estate, the Trustee shall dispose of the Trust Estate as follows:

A. Personal Property List. All personal properties listed on the attached Personal Property List are to be distributed to the named beneficiaries in addition to their respective distributive shares of the Trust Estate.

B. Specific Distributions. The Trustee shall make the following specific distributions:

1. Gary E. Patterson. Five Thousand Dollars (\$5,000) shall be set aside for Gary E. Patterson, my son. If Gary E. Patterson has predeceased me then this share shall be divided among the descendants of Gary E. Patterson by right of representation. Distribution of this share shall be subject to the restrictions provided in paragraphs C1 and C2 below.

2. Judy Ann Henry. Five Thousand Dollars (\$5,000) shall be set aside for Judy Ann Henry, my daughter. If Judy Ann Henry has predeceased me then this share shall be divided among the descendants of Judy Ann Henry by right of representation. Distribution of this share shall be subject to the restrictions provided in paragraphs C1 and C2 below.



3. Rex A. Patterson. Five Thousand Dollars (\$5,000) shall be set aside for Rex A Patterson, my son. If Rex A. Patterson has predeceased me then this share shall be divided among the descendants of Rex A. Patterson by right of representation. Distribution of this share shall be subject to the restrictions provided in paragraphs C1 and C2 below.

4. Vicky D. Romero. All of the California real estate shall be distributed to Vicky D. Romero, my daughter. If Vicky D. Romero has predeceased me then this property shall be divided among the descendants of Vicky D. Romero by right of representation. Distribution of this share shall be subject to the restrictions provided in paragraphs C1 and C2 below. This distribution is in addition to the share of the Trust Estate to be distributed in paragraph C below.

5. Ronald S. Patterson. The home and five (5) acres of real estate shall be distributed to Ronald S. Patterson, my son. The five (5) acres is a portion of the property located in Davis County currently identified as Serial No. 14-040-0067. Such portion shall be five (5) acres only (from this 14.34 acre parcel) and shall be the approximately five (5) acres located in closest proximity to the North side of the current home of Ronald S. Patterson. If Ronald S. Patterson has predeceased me then this property shall be divided among the descendants of Ronald S. Patterson by right of representation. Distribution of this share shall be subject to the restrictions provided in paragraphs C1 and C2 below. This distribution is in addition to the share of the Trust Estate to be distributed in paragraph C below.

6. Ricky A. Patterson. Ten Thousand Dollars (\$10,000) shall be set aside for Ricky A. Patterson, my son. If Ricky A. Patterson has predeceased me then this share shall be divided among the descendants of Ricky A. Patterson by right of representation. Distribution of this share shall be subject to the restrictions provided in paragraphs C1 and C2 below.

7. Randy D. Patterson. All of the Cache County real estate shall be distributed to Randy D. Patterson, my son. If Randy D. Patterson has predeceased me then this property shall be divided among the descendants of Randy D. Patterson by right of representation. Distribution of this share shall be subject to the restrictions provided in paragraphs C1 and C2 below. This distribution is in addition to the share of the Trust Estate to be distributed in paragraph C below.

C. Division of Trust Estate. The remainder of the Trust Estate shall be equally divided by the Trustee among my following three (3) children: Vicky D. Romero, Ronald S. Patterson, and Randy D. Patterson. If one of these three (3) children has predeceased me then the share of the Trust Estate for that child shall be divided among the descendants of that child by right of representation.

1. Each beneficiary that has attained (or when the beneficiary does attain) age twenty-five (25) years shall have their share distributed to them.

2. Until a beneficiary has attained age twenty-five (25) years, the share for such beneficiary shall be held in a separate trust for the benefit of that beneficiary. Each trust may be used for the support and education of the beneficiary. Education shall include, but

not be limited to, musical education, dancing lessons, grammar school, secondary school, college, graduate school, trade school and vocational training school.

D. Disclaimed and Unclaimed Interests. Except as provided otherwise, if any of the above beneficiaries are unable or unwilling to take any portion of the Trust Estate then the Trustee shall distribute that portion of the property of that beneficiary to his or her descendants by right of representation and, if none, then to the other beneficiaries proportionate to each beneficiary's interest in the Trust. If there are no remaining beneficiaries then the Trustee shall distribute the property to my living heirs at law in the same priority and distributive order as listed in the law of intestate succession of the state of Utah as in force on the date of the signing of this Trust Agreement.

E. Contingent Vesting. If any interest in any part of the Trust Estate would vest in any person if he or she were alive upon the occurrence of any contingency, such as the death of an individual or the obtaining a specified age, and that person dies under conditions that it would be difficult or impossible to determine whether or not he or she was alive upon the occurrence of the contingency, that person shall be deemed to have died prior to the occurrence of the contingency.

## ARTICLE X

### FAMILY MEMBERS AND TRUSTEES

A. Children. My present living children are:

Gary E. Patterson

Judy Ann Henry

Rex A. Patterson

Vicky D. Romero

Ronald S. Patterson

Ricky A. Patterson

Randy D. Patterson

B. Trustee. The following people will act as Trustee in the following order of succession:

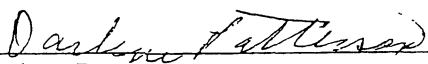
1. Darlene Patterson.

2. Ronald S. Patterson (my son) and Randy D. Patterson (my son), jointly. If one of these Trustees are unwilling or unable to serve then the remaining Trustee shall serve as a Co-Trustee with Vicky D. Romero (my daughter), jointly or the survivor.

3. A Trustee chosen by the majority in interest of the beneficiaries (in proportion to each beneficiary's interest in the Trust Estate). A parent or legal guardian shall be entitled to vote for minor beneficiaries.

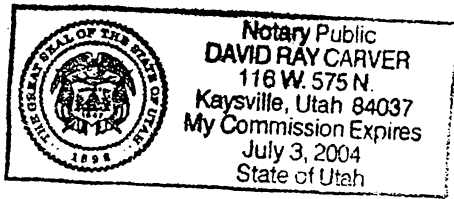
IN WITNESS WHEREOF, I have executed this Restatement on the 12 day of

March 2001 as Trustor and Trustee.

  
\_\_\_\_\_  
Darlene Patterson

State of Utah )  
 )  
County of Garfield ) ss.

The foregoing instrument was acknowledged before me this 12 day of  
March 2001 by Darlene Patterson.



David Ray Carver  
Notary Public  
Residing at:  
My Commission Expires:

Tab I

AMENDMENT TO  
THE DARLENE PATTERSON FAMILY PROTECTION TRUST

I, the Trustor, Darlene Patterson, of West Point, Utah, hereby amend The Darlene Patterson Family Protection Trust dated July 30, 1999 and signed by me as Trustor and Trustee. This amendment shall be effective as of the date of its execution.

Article IX paragraphs B and C are hereby amended and restated in full as follows:

B. Specific Distributions. The Trustee shall make the following specific distributions:

1. Vicky D. Romero. Vicky D. Romero, my daughter, shall be distributed all of my real estate located in California in addition to her share of the Trust Estate as provided in paragraph C below. If Vicky D. Romero has predeceased me then this share shall be divided with the remainder of my Trust Estate as provided in paragraph C below.

2. Randy D. Patterson. Randy D. Patterson, my son, shall be distributed all of my real estate located in Cache County, Utah, in addition to his share of the Trust Estate as provided in paragraph C below. If Randy D. Patterson has predeceased me then this share shall be divided with the remainder of my Trust Estate as provided in paragraph C below.

3. Judy Ann Henry. Judy Ann Henry, my daughter, shall be distributed one-half of the value of my home (or one-half of the proceed of my home if I sold it) located at 4056 West 1300 North, West Point, Utah, in addition to her share of the Trust Estate as provided in paragraph C below. If Judy Ann Henry has predeceased me then this share shall be divided with the remainder of my Trust Estate as provided in paragraph C below.

4. Gary E. Patterson. The share that will be distributed to Gary E. Patterson shall be treated as having received an inheritance advancement in the amount of Twelve Thousand Dollars (\$12,000). This amount shall be deducted from the share that would have been distributed to him pursuant to the provision in Article IX paragraph C below. However, should he have predeceased me then any share to be distributed to his descendants shall not be charged with this inheritance advancement.

C. Division of Trust Estate. Subject to the inheritance advancement in paragraph B4 above, the remainder of the Trust Estate (including any remaining real estate) shall be divided by the Trustee among my following children on a per stirpes basis: Gary E. Patterson, Judy Ann Henry, Rex A. Patterson, Vicky D. Romero, Ricky A. Patterson, and Randy D. Patterson. I have intentionally not provided anything for my son Ronald S. Patterson (or his descendants) since I have already properly provided for this son during his lifetime as I felt was appropriate. Any share set aside for the descendants of a deceased child shall be divided among the descendants of that child by right of representation.

1. Each beneficiary that has attained (or when the beneficiary does attain) age twenty-five (25) years shall have their share distributed to them.

2. Until a beneficiary has attained age twenty-five (25) years, the share for such beneficiary shall be held in a separate trust for the benefit of that beneficiary. Each trust may be used for the support and education of the beneficiary. Education shall include, but not be limited to, musical education, dancing lessons, grammar school, secondary school, college, graduate school, trade school and vocational training school.



Article X paragraph B is hereby amended and restated in full as follows:

B. Trustee. The following people will act as Trustee in the following order of succession:

1. Darlene Patterson.
2. Judy Ann Henry and Randy D. Patterson (two of my children), jointly or the survivor.
3. A Trustee chosen by the majority in interest of the beneficiaries (in proportion to each beneficiary's interest in the Trust Estate). A parent or legal guardian shall be entitled to vote for minor beneficiaries.

This Amendment is attached to the above referenced Trust and by reference incorporated therein. All other provisions of the Trust not inconsistent with this Amendment remain in full force and effect.

IN WITNESS WHEREOF I have executed this Amendment on the 30 day of

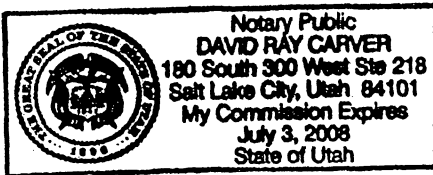
May 2006 as Trustor and Trustee.

Darlene Patterson  
Darlene Patterson

State of Utah )

County of Davis ) :SS.

The foregoing instrument was acknowledged before me this 30 day of  
May 2006 by Darlene Patterson.



David Ray Carver  
Notary Public  
Residing at:  
My Commission Expires:

Tab J

« Remember, for Every Case Won at Oral Argument, the Other Side Loses | Main |  
Objectives of Revocable Trusts »

## Can You Amend That Revocable Trust? Utah Estate Planning Lawyers Face a Trap for the Unwary

### **Can You Amend That Revocable Trust? Utah Estate Planning Lawyers Face a Trap for the Unwary**

by Charles M. Bennett

Revocable living trusts have become a ubiquitous estate planning tool in Utah. Thousands of Utahns have such trusts, most prepared by Utah lawyers. One of the benefits of revocable living trusts is the ability to easily amend them prior to the death of the trustor. Several recent Utah Supreme Court decisions, however, require revocation rather than amendment under certain circumstances. As such an amendment will likely not be questioned until after the death of the trustor - when it is too late to go back and repair anything - attorneys who have prepared revocable trusts or who represent those who have such trusts need to carefully review these trusts in light of the recent rulings.

In *Banks v. Means*, 11 9-16, 52 P.3d 1190, 452 Utah Adv. Rep. 10, 2002 UT 65 (2002), the Utah Supreme Court had to determine whether a trustor was entitled to amend her revocable living trust agreement to change the remainder beneficiaries. Shortly before the trustor's death, she amended her trust, removed her children as primary beneficiaries upon her death, named her sister as the primary beneficiary, and named her children as contingent beneficiaries. *Id.* at ¶5. Although the circumstances surrounding the amendment were unusual,<sup>1</sup> the court assumed the amendment was properly executed. The issue before the Court was whether the trustor had the power under the trust agreement to amend the trust and divest the beneficiaries' interest. The relevant part of the trust agreement provided:

3.1 Rights of the Undersigned. As long as the Undersigned is alive, the Undersigned reserves the right to amend, modify or revoke this Trust in whole or in part, including the principal, and the present or past undisbursed income from such principal. Such revocation or amendment of this Trust may be in whole or in part by written instrument. Amendment, modification or revocation of this instrument shall be effective only when such change is delivered in writing to the then acting Trustee. On the revocation of this instrument in its entirety, the Trustee shall deliver to the Undersigned, as the Undersigned may direct in the instrument of revocation, all of the Trust property.

3.2 Interests of the Beneficiaries. *The interests of the beneficiaries are presently vested interests subject to divestment which shall continue until this Trust is revoked or terminated other than by death.* As long as this Trust subsists, the Trust properties and all the rights and privileges hereunder shall be controlled and exercised by the Trustee named herein in their fiduciary capacity.

(Emphasis added.) The Supreme Court ruled that the italicized language in the second paragraph authorized the trustor to divest the beneficiary's interest *only if* the trustor revoked the trust in its entirety. *Banks v. Means* at ¶16. "[A] trust that specified revocation of a vested beneficiary interest through divestiture could only divest those beneficiary interests through a complete revocation of the trust." *In re Estate of Flake*, 16, 71 P.3d 589, 472 Utah Adv. Rep. 18, 2003 UT 17 (2003) (interpreting *Banks v. Means*). Although the trustor in *Banks* expressly reserved the right "to amend, modify or revoke this Trust," the Court ruled that an amendment could not divest a beneficiary's interest. Thus, the purported amendment was void.

The Court's ruling in *Banks* might be construed to limit the trustor's otherwise plenary reservation of the right to amend the Trust to amendments that did not modify the beneficial interests of a beneficiary, such as changing trustees, increasing or decreasing trustee powers, and other administrative issues. Any amendment that changed beneficial interests would necessarily divest a beneficiary's interest, at least in part. However, as discussed below, in the 2003 *Flake* decision, the Supreme Court approved an amendment to a trust with substantially identical language to that in *Banks* where the amendment reduced, but did not eliminate, the unhappy beneficiary's interest in the trust.

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The previous post in this blog was Remember, for Every Case Won at Oral Argument, the Other Side Loses.

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In *Flake*, ¶17, the Supreme Court recognized that the purpose of the vesting language in the paragraph entitled "Interests of the Beneficiaries" was to insure that the revocable living trust was not deemed to be an illusory trust. Historically, lawyers creating revocable living trusts were concerned that the trust could be voided if the trustor had the power to revoke the trust. See e.g. *MacGregor v. Fox*, 114 N.Y.S.2d 286, 280 A.D. 435 (N.Y. App. 1952) (holding trust illusory and "void in its entirety"); but see *In re Estate of Groesbeck*, 935 P.2d 1255, 1257-58 (Utah 1997) (holding a revocable trust with either contingent or vested remainder beneficiaries was not illusory). Thus, the purpose of the language was not to protect the beneficiary's interest from being deleted by an amendment, as seems to be the perception in *Banks*, but rather to insure that the revocable living trust was not deemed illusory.

The *Banks* analysis is thus revealed to be seriously flawed. It is illogical to believe that a trustor reserves the power "to amend, modify or revoke" only to restrict the right to amend, but not the right to revoke. Such a reading truly exalts form over substance. Under general contract law, "an interpretation that will produce an inequitable result will be adopted only where the contract so expressly and unequivocally so provides that there is no other reasonable interpretation to be given it." *Peirce v. Peirce*, ¶19, 994 P.2d 193, 386 Utah Adv. Rep. 38, 2000 UT 7 (2000) (citations omitted). Far from requiring an unreasonable interpretation, the *Banks* trust language supports the opposite conclusion. The trustor in *Banks* did not retain just the power "to amend, modify or revoke." Instead, she retained the right "to amend, modify or revoke this Trust in whole or in part." Indeed, the trust document reiterated that the revocation could be in whole or in part in the very next sentence: "Such revocation or amendment of this Trust may be in whole or in part by written instrument." The Court should have recognized that an amendment that deletes one beneficiary and adds another is a revocation of the Trust "in part" as to the deleted beneficiary's rights in the trust.

The harshness of the holding in *Banks*, however, is somewhat ameliorated by the Supreme Court's 2003 *Flake* decision, 2003 UT 17 at ¶¶16-22. There, the Supreme Court held that the language in the *Flake* trust permitted an amendment partially divesting a beneficiary's interest in the Trust. The relevant language of the trust agreement in *Flake* was:

#### **Revocation and Amendment**

As long as the Undersigned is alive, he reserves the right, without the consent or approval of any other, to amend, modify, revoke, or remove from this Trust the property that he has contributed, in whole or in part, including the principal and the present or past undisbursed income from such principal. (Emphasis [in Court's opinion]).

*Id.* at ¶5.

#### **Vested Interest of Beneficiaries**

The interest of the beneficiaries is a present vested interest which shall continue until the Trust is revoked or terminated other than by death.

*Id.* at ¶17. Interpreting this language, the Supreme Court held:

This language at issue [in *Flake*] lacks any reference to a complete divestiture. The beneficial interest of Mrs. Flake was merely amended, and not completely divested as was the case in *Banks*. The dispositive issue in the present case is whether there was a complete divestiture of a beneficial interest as in *Banks*, or whether there was simply a change in the quality, or scope, of the beneficial interest. We held in *Banks* that revocation was required when terminating a vested beneficial interest. Here, we find that there is no requirement of revocation where the beneficial interest is simply modified or amended but not terminated. Therefore, Mrs. Flake's beneficial interest, as amended, was completely outlined in the 1998 Restatement, inasmuch as the 1998 Restatement contained all of the operative provisions of the Almon J. Flake Family Trust. The purpose and primary effect of Article XIV in the 1987 Trust Agreement is to save the Trust from the doctrine of merger and to prove that the Trust is not illusory.<sup>1</sup>

*Id.* at ¶22 (emphasis in Court's opinion). The Court's declaration that "[t]he dispositive issue in the present case is whether there was a complete divestiture of a beneficial interest as in *Banks*, or whether there was simply a change in the quality, or scope, of the beneficial interest" would seem to indicate that a trustor can amend a trust with the *Banks* language if the amendment only modifies, rather than eliminating, a beneficiary's beneficial interest. On the other hand, the Court noted that the language "subject to divestment" was not present in *Flake*, nor was there any "reference to a complete divestment." It was the Supreme Court that italicized these terms in its opinion.

While the language of the trusts regarding the vesting of beneficial interests is different, there is no logical distinction to be drawn between the language of the two trusts. In *Flake*, an amendment terminating a beneficiary's interest in the trust would constitute a complete divestment whether or not the trust said the beneficiary's interest was "subject to divestment" as in *Banks*. Nevertheless,

by noting that "subject to divestment" was present in *Banks* but not in *Flake*, the Court appears to believe this distinction meaningful. In any event, it remains unclear whether the trustor of a trust with language identical to *Banks* could modify, but not delete, a beneficiary's beneficial interest in the trust.

What prompted this article, and makes this more than just a mere academic analysis of two Supreme Court rulings, was a concern that there may be tens of thousands of trusts extant in Utah with language identical to that found in *Banks*. During a period of over ten years, spanning the 1990's, one Utah lawyer created several thousand trusts using language identical to that interpreted by the Supreme Court in the *Banks*. This lawyer has since retired from the practice of law. Thus, when this lawyer's clients seek to update their trusts, another Utah lawyer will need to deal with trust language identical to that found in the *Banks* trust. Knowing how to revise a trust with language identical to that in *Banks*, without running afoul of that decision, is a key purpose of this article.

Moreover, not only are there numerous trusts containing the precise language of the *Banks* trust, there are perhaps thousands more that contain very similar language. The form used in *Banks* was one that had been developed with input from a number of Utah lawyers. To the extent other lawyers used that same form language, or even to the extent they used language slightly different, such as the trust language in *Flake*, these two cases could torpedo amendments to those trusts as well.

The lesson all estate planning lawyers must learn is thus twofold. First, each lawyer should take a careful look at his or her own forms. Note that the Court in *Banks* probably would have allowed the amendment had the trust used the following language:

Interests of the Beneficiaries. The interests of the beneficiaries are presently vested interests subject to divestment which shall continue until this Trust is *amended*, revoked or terminated other than by death. As long as this Trust subsists, the Trust properties and all the rights and privileges hereunder shall be controlled and exercised by the Trustee named herein in their fiduciary capacity.

The addition of the word "amended" will specifically allow divestment through amendments and would apparently resolve the problem the Supreme Court found with the *Banks* trust provisions. Whether the estate planning lawyer solves this problem as suggested or in some other way, however, it is an issue that demands careful attention.

The second lesson for the estate planning lawyer is to be careful when amending someone else's trust (and perhaps even when amending one's own older trusts). In the case of the *Banks* trust, the reservation of the right to amend or revoke and the vesting of the interests of the beneficiaries were in two adjoining paragraphs of the trust agreement. In *Flake*, the revocation language was in Article XIII while the vesting language was in Article XIV. Since both the revocation and vesting provisions are common boilerplate provisions, they may show up together, as in *Banks*; closely connected, as in *Flake*; or separated by several pages, articles, sections, or paragraphs. Thus, if a lawyer is asked to amend another lawyer's trust agreement, the revising lawyer should carefully review the entire trust agreement. Simply determining that the trust is subject to a power to amend or revoke is no longer sufficient after *Banks* and, to a lesser extent, after *Flake*. For Utah estate planning lawyers, it is an unfortunate trap for the unwary, but the trap can be avoided by careful attention to detail.

1. The amendment was made by removing certain pages from the trust agreement and replacing those pages with new pages stating the trustor's revised plan. *Id.* at ¶5.

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Tab K

# REVOCABLE TRUSTS AND THE LAW OF WILLS: AN IMPERFECT FIT

Alan Newman \*

I.	Introduction.....
II.	Will Execution and Trust Creation .....
III.	The Interest of a Non-Settlor Beneficiary in a Revocable Trust While the Settlor is Living .....
IV.	Protection of the Family.....
V.	The Rights of Creditors of a Decedent .....
VI.	Challenges after the Settlor's Death .....
VII.	Interpretation, Construction and Reformation .....
VIII.	Other Contexts .....
IX.	Conclusion .....

## I. Introduction

Over the centuries that wills have been used to dispose of testators' property at death, the law of wills has developed to address issues that arose.<sup>1</sup> Similarly, over the centuries that trusts have been used for non-testamentary purposes, the law of trusts has developed to resolve resulting issues.<sup>2</sup>

In recent decades revocable trusts have become the most commonly used trust in the United States.<sup>3</sup> To avoid estate administration, particularly in states in which administration involves cumbersome, time-consuming, and expensive court supervision, settlors make inter vivos transfers of assets that otherwise would be subject to administration on their deaths in trust.<sup>4</sup> Typically, the trust instrument provides that the settlor may revoke the trust at any time, in which case its assets are to be returned to the settlor, and designates beneficiaries to whom the trust assets are to be distributed, or held for the benefit of in one or more now irrevocable trusts, following the settlor's death.

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\* Professor of Law, the University of Akron School of Law. B. Acct., 1977, The University of Oklahoma; J.D., with Honors, 1980, The University of Oklahoma. Professor Newman is an Academic Fellow of the American College of Trust and Estate Counsel.

<sup>1</sup> See generally, THOMAS E. ATKINSON, LAW OF WILLS (2<sup>nd</sup> ed. 1953).

<sup>2</sup> See generally, GEORGE GLEASON BOGERT, GEORGE TAYLOR BOGERT & AMY MORRIS HESS, THE LAW OF TRUSTS AND TRUSTEES §§ 2 - 7 (3<sup>rd</sup> ed. \_\_\_\_).

<sup>3</sup> See David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MISSOURI L. REV. 143, 186 (2002). Note that with inter vivos trusts being used so commonly as will substitutes in recent years, the fundamental question of whether a trust is revocable or irrevocable is being answered differently than it was in the past. Under the UTC, unlike at common law, trusts are revocable unless expressly made irrevocable. See UNIF. TRUST CODE § 602(a) & cmt. (2005).

<sup>4</sup> "Pour over" wills that devise part or all of the testator's probate estate to the revocable trust usually also are part of the plan.



### III. The Interest of a Non-Settlor Beneficiary in a Revocable Trust While the Settlor is Living

Generally, during the lifetime of a testator, a devisee under the testator's will has a mere expectancy with respect to, and not an interest in, the testator's property.<sup>41</sup> By contrast, traditionally a remainder beneficiary of a revocable trust<sup>42</sup> was viewed as receiving a beneficial interest in trust property upon creation of the trust.<sup>43</sup> Because revocable trusts are used primarily to avoid estate administration and provide for the management of property in the event of the settlor's incapacity without the need for a court supervised conservatorship, the trend increasingly is to treat the interest of a remainder beneficiary in a revocable trust during the lifetime of the settlor as an expectancy.<sup>44</sup>

**A. Duties of the Trustee to Remainder Beneficiaries.** A fundamental issue raised is whether the remainder beneficiary is entitled to information about the trust, and able to enforce it, while the settlor is living. If the settlor is competent, as a practical matter it often will be of little consequence whether a remainder beneficiary is owed enforceable duties. Often, a remainder beneficiary will not know of the trust or her interest in it, or will consider the trust and its assets as belonging solely to the settlor and not seek information about the trust or to enforce its terms. If a remainder beneficiary demanded information or otherwise attempted to enforce the trust over the objection of the settlor, the settlor could amend the terms of the trust to eliminate the remainder beneficiary's interest. If the settlor agreed with the remainder beneficiary's position with regard to the enforcement of the trust against a non-settlor trustee, the settlor could enforce the trust herself. Presumably, such reasons explain why there appear to be few cases in which a remainder beneficiary has attempted to enforce the terms of a revocable

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<sup>41</sup> See, e.g., *Meeks v. Kirkland*, 187 S.E.2d 296 (Ga. 1972).

<sup>42</sup> Non-settlor beneficiaries of a revocable trust sometimes are permissible, or less frequently mandatory, distributees of income, principal, or both during the settlor's lifetime. Because of the settlor's retention of complete ultimate control over the trust through the power to revoke or amend, however, and for the sake of simplicity, non-settlor beneficiaries of revocable trusts generally are referred to in this article as remainder beneficiaries.

<sup>43</sup> See GEORGE GLEASON BOGERT, GEORGE TAYLOR BOGERT & AMY MORRIS HESS, *THE LAW OF TRUSTS AND TRUSTEES* § 104 (2d ed. 1983); *First Nat. Bank of Cincinnati v. Tenney*, 138 N.E.2d 15 (Ohio 1956).

<sup>44</sup> See, e.g., RESTATEMENT (THIRD) OF TRUSTS § 25 cmt. a (2003); John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1113 (1984) (stating "[t]he owner who retains both the equitable life interest and the power to alter and revoke the beneficiary designation has used the trust form to achieve the effect of testation. Only nomenclature distinguishes the remainder interest created by such a trust from the mere expectancy arising under a will."). Consistent with that position, under the Restatement creditors of a remainder beneficiary of a revocable trust may not reach her interest in the trust during the settlor's lifetime. RESTATEMENT (THIRD) OF TRUSTS § 56 cmt. b (2003). Note, though, that in a recent Colorado case, a remainder beneficiary's interest in the revocable trust of a living settlor was considered in determining the division of property of the beneficiary and the beneficiary's spouse in their divorce. *In re Marriage of Gorman*, 36 P.3d 211 (Colo. Ct. App. 2001). Shortly after *Gorman* was decided, however, it was effectively overruled legislatively. See COLO. REV. STAT. § 14-10-113(7)(b) ( ).

trust while the settlor is living.<sup>45</sup> More fundamentally, given that the settlor of a revocable trust has complete ultimate control over the trust and its assets, the right to enforce the trust, at least while the settlor has capacity, should belong only to the settlor.<sup>46</sup> For that reason, the general rule under the Uniform Trust Code (“UTC”) is that during the settlor’s lifetime, the trustee of a revocable trust owes no duties to remainder beneficiaries, who thus may not enforce the trust.<sup>47</sup>

That result is consistent with viewing revocable trusts as the functional equivalent of wills and subjecting them to the law of wills. During a testator’s lifetime, devisees under her will have no interest in her assets and thus no enforceable rights with respect to their management. That is the case even if the testator has become incapacitated. If the settlor of a revocable trust becomes incapacitated, however, the analogy to a testator and devisees with mere expectancies breaks down.

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<sup>45</sup> For one such case, holding that remainder beneficiaries lacked standing to sue the trustee of a revocable trust for breach of duty during the settlor’s lifetime, see *Hoelscher v. Sandage*, 462 N.W.2d 289 (Iowa App. 1990). In *Linthicum v. Rudi*, 148 P.3d 746 (Nev. 2006), remainder beneficiaries whose interests were eliminated by the settlor amending the terms of a revocable trust challenged the validity of the amendment by alleging that the settlor lacked capacity and acted under undue influence. In upholding the lower court’s granting of the successor trustee’s motion to dismiss, the Nevada Supreme Court held that remainder beneficiaries of a revocable trust have only contingent interests that do not vest until the settlor’s death, and thus do not have standing to challenge the trust during the settlor’s life. Similarly, in *Moon v. Lesidar*, 230 S.W.3d 800 (Tex. App. 2007), a remainder beneficiary of a revocable trust was held to lack standing to sue, after the settlor’s death, a non-settlor cotrustee of the trust with respect to a sale of stock by the settlor to the cotrustee. See also *Lewis v. Star Bank, N.A.*, 630 N.E.2d 418 (Ohio App. 1993) (holding that remainder beneficiaries of a revocable trust could not sue the trustee after the settlor’s death with respect to conduct of the trustee before the settlor’s death).

<sup>46</sup> In a Florida case, a competent settlor’s revocation of her revocable trust was challenged by the trustee on the ground that the settlor was acting under undue influence. *Florida Nat. Bank v. Genova*, 460 So.2d 895 (Fla. 1984). In upholding the revocation, the Florida Supreme Court held that undue influence cannot bar a competent settlor from revoking a revocable trust. *Id.* Relying, in part, on *Genova*, a lower court in a subsequent Florida case rejected the attempt of the guardian of an incompetent settlor of Totten trust accounts to disaffirm the trusts. *Ullman v. Garcia*, 645 So.2d 168 (Fla. App. 1994). For criticism of broad dictum in *Ullman* arguably indicating that a conservator of an incompetent settlor of a revocable trust could not pursue a breach of trust claim against the trustee of a traditional revocable trust, see RESTATEMENT (THIRD) OF TRUSTS § 74 cmt. a(2) and e (2003).

<sup>47</sup> UNIF. TRUST CODE § 603(a) (2005). See *Stanton v. Wells Fargo Bank*, 152 P.3d 115, 122 (Mont. 2007) (applying a Montana statute similar to § 603(a) of the UTC). For a discussion of whether, under the UTC, the trustee owes duties to remainder beneficiaries during the settlor’s incapacity, see *infra* notes \_\_\_-\_\_\_ and accompanying text. In *re Malasky*, 736 N.Y.S.2d 151 (2002), a case not decided under the UTC, involved a joint revocable trust the decedent and his wife had created and of which they served as cotrustees. Children of the decedent from a prior marriage were remainder beneficiaries. *Id.* at 152. Following the decedent’s death, the children objected to the surviving spouse/trustee’s accounting for the period from the creation of the trust until the decedent’s death. The court held that the children, “having no pecuniary interest in the revocable trust until decedent’s death, lack[ed] standing to object to the account...” *Id.* at 153. By contrast, a Florida court, applying New York law, held that remainder beneficiaries of a revocable trust could pursue a claim against the trustee of the trust, who was not the settlor, with respect to the administration of the trust during the settlor’s lifetime. See *Siegel v. Novak*, 920 So.2d 89 (Fla. App. 2006). Similarly, in *Cloud v. U.S. Nat’l Bank of Oregon*, 570 P.2d 350 (Or. 1977), remainder beneficiaries were able to bring a claim against the trustee of a revocable trust after the settlor’s death for disbursements that allegedly were improperly made to the settlor after she had become incapacitated, or that were made to her as a result of requests she made while under undue influence.

For example, assume that the terms of a revocable trust provide that if the settlor becomes incapacitated, the trustee shall make distributions to one or more other beneficiaries. A settlor who creates and funds such a trust is attempting to accomplish more than providing for the management of her property without the need for a guardianship, if she becomes incapacitated, and disposing of her property at death without an estate administration. Accordingly, section 603(a) of the UTC, as initially promulgated, provided that the trustee's duties are owed exclusively to the settlor only while the settlor has capacity.<sup>48</sup> Section 603(a), however, has not been well received.<sup>49</sup> As a result, in 2004 it was amended to place brackets around its language making its rule applicable only while the settlor has capacity to revoke the trust.<sup>50</sup> The accompanying comment notes that enacting jurisdictions are free to strike the incapacity limitation on the section's general rule, in which case the trustee's duties would be owed exclusively to the settlor regardless of whether the settlor had capacity to revoke the trust.<sup>51</sup> At least when the terms of the trust provide for others to be current beneficiaries of trust income or principal if the settlor becomes incapacitated, and particularly if distributions to others are mandated in that circumstance, the UTC's original approach to section 603(a) is the appropriate one. If the trustee's duties in such a case are owed exclusively to the settlor, the trustee apparently could ignore the settlor's clear intent that others be current beneficiaries of the trust, and such other beneficiaries not only would be unable to enforce the trust, they might not even know of their interests in it.<sup>52</sup>

<sup>48</sup> See UNIF. TRUST CODE § 603(a) (2000).

<sup>49</sup> From a review of four charts collectively titled, "*Significant Differences in States' Enacted Uniform Trust Codes*," prepared as an unofficial in-house National Conference of Commissioners on Uniform State Laws (NCCUSL) document, it appears that of the first 20 jurisdictions to have enacted a version of the UTC, 12 provide that the duties of the trustee of a revocable trust are owed exclusively to the settlor even if the settlor lacks capacity (Kansas, Nebraska, Maine, Virginia, South Carolina, Oregon, North Carolina, Florida, Alabama, Ohio, Pennsylvania, and North Dakota); seven provide that the trustee's duties also are owed to other beneficiaries if the settlor lacks capacity (Wyoming, New Mexico, Utah, Tennessee, New Hampshire, Missouri, and Arkansas); and one provides that the trustee's duties are owed only to the settlor, but allows other beneficiaries to enforce the settlor's intent to benefit them (the District of Columbia). The charts may be accessed through links on a NCCUSL UTC website:

<http://utcpoject.org/utc/DesktopDefault.aspx>.

<sup>50</sup> UNIF. TRUST CODE § 603(a) (2004).

<sup>51</sup> *Id.* cmt. In explanation, the comment noted not only the desire to treat revocable trusts similarly to wills, but also the issue of how to determine the settlor's capacity, or lack thereof, if the trustee's duties are owed to other beneficiaries if the settlor becomes incapacitated. That issue has been addressed by Missouri's version of the UTC, which provides, in relevant part:

1. While a trust is revocable and the settlor has capacity to revoke the trust, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor.

2. A settlor is presumed to have capacity for the purposes of subsection 1 of this section until either the settlor is adjudicated totally incapacitated or disabled or the trustee has received an affidavit of incapacity...

5. In this section, an "affidavit of incapacity" means a written certificate furnished by at least one licensed medical doctor that states that the settlor lacks capacity to revoke the trust.

MO. STAT. ANN. § 456.6-603 ( ).

<sup>52</sup> For further discussion of this issue, see Alan Newman, *The Ohio Trust Code and Revocable Trusts: Duties of the Trustee While the Settlor is Living*, 17 PROB. L. J. OF OHIO 103 (Jan./Feb. 2007).

Moreover, if the settlor becomes incapacitated and the trustee's duties are owed exclusively to the settlor, presumably the trustee would be accountable only to the settlor's guardian, or agent under a durable power of attorney, for a breach. If the guardian or agent recovered damages from the trustee, the recovery often should belong to the trust for ultimate distribution of any amounts remaining at the settlor's death to the trust's remainder beneficiaries. If the trustee's duties are owed exclusively to the settlor, however, arguably any such recovery would belong to the settlor to be managed by the guardian or agent during the settlor's life, with what remains at the settlor's death distributed under the terms of the settlor's will. While this issue may be of little or no consequence if the settlor's will pours over the residuary estate to the trust, settlors of revocable trusts do not always employ pour over wills, but occasionally provide for different dispositions of their probate estates and trust assets.<sup>53</sup>

If the settlor becomes incapacitated and the trustee thereafter owes duties to the trust's remainder beneficiaries as well as to the settlor, a breach by the trustee while the settlor was incapacitated would be actionable by both the settlor's conservator or agent and by the remainder beneficiaries. Less clear is whether the remainder beneficiaries could hold the trustee accountable for breaches that occurred while the now incapacitated settlor had capacity. Under the UTC, arguably they could not, as it provides that "[w]hile a trust is revocable and the settlor has capacity to revoke the trust, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor."<sup>54</sup> If no duties are owed to remainder beneficiaries while a settlor has capacity to revoke the trust, a breach of the trustee's duty that occurs while the settlor has capacity would seem to be actionable only by the settlor (or her conservator or agent). A UTC comment, however, indicates otherwise:

Following the death or incapacity of the settlor, the beneficiaries would have a right to maintain an action against a trustee for breach of trust. However, with respect to actions occurring prior to the settlor's death or incapacity, an action by the beneficiaries could be barred by the settlor's consent or by other events such as approval of the action by a successor trustee.<sup>55</sup>

Because the comment's implicit assumption – that after the settlor has become incapacitated, remainder beneficiaries may maintain an action against the trustee for

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<sup>53</sup> Ohio's recently enacted version of the UTC addresses this issue by providing that the allocation of such a recovery between the settlor, if living, the settlor's estate, if the settlor is not living, and the revocable trust is left to the discretion of the court. OHIO REV. CODE ANN. § 5806.03(A) (West 2007). The comments to the UTC address it by noting that an action brought by the conservator or agent of an incapacitated settlor would be to have property restored to the trust. UNIF. TRUST CODE § 603 cmt. (2005). That may not always be the case, however. To illustrate, if the trustee breached its duty by not making payments on mortgage indebtedness of an incapacitated settlor on property specifically devised by the settlor's will to a non-trust beneficiary, the recovery should not belong to the trust.

<sup>54</sup> UNIF. TRUST CODE § 603(a) (2005). As discussed in note \_\_, *supra*, § 603(a) was amended in 2004 to place brackets around the language limiting its general rule to settlors who have capacity to revoke their trusts.

<sup>55</sup> UNIF. TRUST CODE § 603 cmt. (2005).

breaches that occurred while the settlor had capacity – arguably is inconsistent with the UTC itself, a court might reject its position.<sup>56</sup>

**B. Revocation or Amendment.** With the proliferation in the use of revocable trusts in recent years have come many cases in which the issue was whether the settlor had effectively exercised her reserved power to revoke or amend.<sup>57</sup> Generally, wills law is not applied in resolving such issues.

Two recent Utah Supreme Court decisions illustrate the extent to which some courts will strictly apply trust law to the issue of whether a revocable trust, used as a will substitute, has been revoked or amended. In *Banks v. Means*,<sup>58</sup> the trust instrument, which named the settlor's children as joint beneficiaries following her death,<sup>59</sup> provided that the settlor "reserves the right to amend, modify or revoke this Trust in whole or in part...On the revocation of this instrument in its entirety, the Trustee shall deliver to the [settlor]...all of the Trust property."<sup>60</sup> The instrument further provided that: "The interests of the beneficiaries are presently vested subject to divestment which shall continue until this Trust is revoked or terminated other than by death."<sup>61</sup> Years after creating the trust, the settlor executed an amendment to its terms that provided for the trust assets to be distributed to her sister on her death.<sup>62</sup> If the settlor's sister predeceased her, the trust assets were to be distributed to the settlor's children.<sup>63</sup>

When the settlor died, her children's challenge to the validity of the amendment was upheld.<sup>64</sup> The court acknowledged that the settlor had reserved the power to revoke or amend the trust, but found that not only had she created vested interests in her children, she had specifically provided that while those interests could be divested, they were to continue until the trust was revoked or terminated.<sup>65</sup> Thus, the court concluded that "a complete revocation was required to divest the beneficiaries of their vested

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<sup>56</sup> See *American Ins. Co. v. Cuyahoga Community College District*, 774 N.E.2d 802 (Ohio Ct. Cl. 2002).

<sup>57</sup> See generally, RESTATEMENT (THIRD) OF TRUSTS § 63 cmts. h and i and rptr. notes thereto (2003) (characterizing the case law in this area as "somewhat unclear and troublesome"); RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 7.2 cmt. e (2003); Annotation, Exercise by Will of Trustor's Reserved Power to Revoke or Modify Inter Vivos Trust, 81 A.L.R.3d 959 (1977). Note that action taken by a settlor to revoke a revocable trust in accordance with the terms of the trust will be effective to do so even if title to trust assets is not formally transferred back to the settlor before her death. See *State Bank of Parsons v. First Nat. Bank in Wichita*, 504 P.2d 156 (Kan. 1972).

<sup>58</sup> 52 P.3d 1190 (Utah 2002).

<sup>59</sup> *Id.* at 1191.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* In an earlier decision, *In re Estate of Groesbeck*, 935 P.2d 1255 (Utah 1997), Utah's Supreme Court had held that "a revocable trust can be created, without being deemed illusory, as long as title to the property passes to the trustee and vested interests are created in the beneficiaries, even if these interests are subject to divestiture." *Banks*, at 1193. In *Banks*, the settlor's sister unsuccessfully argued that the provision in the trust instrument specifying that vested interests were created in the children was intended to establish that the trust was not illusory, not to restrict the settlor's ability to divest the children's interests. *Id.*

<sup>62</sup> *Id.* at 1192.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 1191.

<sup>65</sup> *Id.* at 1193-94.

interests.”<sup>66</sup> Because the amendment did not revoke the trust, it was ineffective to affect the children’s interests. The rationale for the court’s holding emphasizes the traditional distinction between revocable trusts, under which remainder beneficiaries have vested interests (though subject to divestment by exercise of the settlor’s power of revocation) during the settlor’s lifetime, and wills, under which devisees have expectancies rather than interests in the testator’s property during her lifetime:

Once the settlor has created the trust he is no longer the owner of the trust property and has only such ability to deal with it as is expressly reserved to him in the trust instrument. Thus, a settlor has the power to modify or revoke a trust only if and to the extent that such power is explicitly reserved by the terms of the trust. Furthermore, the creation of a trust involves the transfer of property interests in the trust subject-matter to the beneficiaries. These interests cannot be taken from [the beneficiaries] except in accordance with a provision of the trust instrument.<sup>67</sup>

The Utah Supreme Court is not alone in limiting the ability of settlors of revocable trusts to revoke or modify them on the ground that remainder beneficiaries of such trusts have interests defined by, and subject to change only in accordance with, the terms of the trust instrument.<sup>68</sup> Such decisions, while supported by traditional trust law doctrine, not only are intention defeating, but also exalt form over substance in ignoring the practical reality that settlors of revocable trusts commonly use them as will substitutes and consider the trust assets as their own, without limitation. For such reasons, the UTC relaxes considerably the rules followed in some jurisdictions under which, if the terms of the trust prescribe a method for revoking or amending it, the settlor may do so only by employing the method so specified.<sup>69</sup>

Under the UTC,<sup>70</sup> a revocable trust may be revoked or amended by “any...method manifesting clear and convincing evidence of the settlor’s intent,”<sup>71</sup> unless the terms of the trust not only specify a method, but also expressly make it exclusive.<sup>72</sup> Further, even

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<sup>66</sup> *Id.* at 1193.

<sup>67</sup> *Id.* at 1192-93 (citations and quotation marks omitted). The court’s decision in *Banks* created significant concern among Utah estate planners. See Charles M. Bennett, *Can You Amend that Revocable Trust? Utah Estate Planning Lawyers Face a Trap for the Unwary*, 17 UTAH BAR J. 32 (Aug./Sept. 2004) (speculating that “there may be tens of thousands of trusts extant in Utah with language identical to that found in *Banks*”). A year after *Banks*, the Utah Supreme Court, while not overruling *Banks*, limited its effect significantly. See *In the Matter of the Estate of Flake*, 71 P.3d 589 (Utah 2003) and its discussion in Mr. Bennett’s Utah Bar Journal article cited above. See also *Hoggan v. Hoggan*, 169 P.3d 750 (Utah 2007).

<sup>68</sup> See, e.g., *In re Estate and Trust of Pilafas*, 836 P.2d 420, 423 (Ariz. App. 1992) (stating that “[e]ven a revocable trust vests the trust beneficiary with a legal right to enforce the terms of the trust... The terms of the trust also limit the powers of the settlor and trustee over the trust corpus, even when the settlor declares himself trustee...”).

<sup>69</sup> See, e.g., *In re Reid*, 46 P.3d 188 (Okla. App. 2002); *Salem United Methodist Church v. Bottorff*, 138 S.W.3d 788 (Mo. 2004). If a trust may be revoked or amended, but its terms do not provide a method for doing so, the settlor may revoke or amend by any method that sufficiently evidences the settlor’s intent. See RESTATEMENT (SECOND) OF TRUSTS § 330 cmt. i (1959).

<sup>70</sup> The new Restatement’s rules are similar to the UTC’s. See RESTATEMENT (THIRD) OF TRUSTS § 63 cmts. h & i (2003).

<sup>71</sup> UNIF. TRUST CODE § 603(c)(2)(B) (2005).

<sup>72</sup> UNIF. TRUST CODE § 603(c)(2) (2005).

if the trust terms expressly provide an exclusive method of revocation or amendment, substantial, rather than strict, compliance will be sufficient.<sup>73</sup> Specifically authorized (unless the terms of the trust expressly provide an exclusive alternative method) is a revocation or amendment by a later will or codicil, but only if it “expressly refers to the trust or specifically devises property that would otherwise have passed according to the terms of the trust.”<sup>74</sup>

The UTC’s trust revocation and amendment rules, while clearly intent furthering, do not track those applicable to wills. For example, while the UTC recognizes the right of a settlor to specify an exclusive method of revocation or amendment, the methods of revoking or revising a will are set by statute. Further, the UTC is silent on the effect, if any, of the inability to find the original trust instrument on the death of a settlor of a revocable trust. In most jurisdictions, if a testator had possession of the original will and it cannot be located at her death, a presumption arises that the testator destroyed it intending to revoke it.<sup>75</sup> Application of that presumption to revocable trusts would be problematic. Because a will generally has no legal effect until the testator’s death, it can be presumed to have been revoked when it was in the testator’s possession and cannot be located at her death without affecting property rights during the testator’s lifetime. By contrast, if the original instrument creating a funded revocable trust was in the settlor’s possession and cannot be located at her death, treating the trust as having been revoked would raise such questions as when it was revoked and what effect its revocation had on transactions the trustee had engaged in with respect to its property.<sup>76</sup>

Another revocation issue that differs for wills and revocable trusts is the effect of a divorce on provisions in the instrument in favor of the testator’s or settlor’s spouse.

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<sup>73</sup> UNIF. TRUST CODE § 603(c)(1) (2005).

<sup>74</sup> UNIF. TRUST CODE § 603(c)(2)(A) (2005). Thus, a residuary clause in a will that disposes of the estate differently than does the trust instrument will not effect a revocation or amendment of the terms of the trust. See UNIF. TRUST CODE § 603 cmt. (2005). Many non-UTC cases have addressed the issue of whether a revocable trust can be revoked or amended by will or codicil. The decisions typically turn on such issues as whether the trust instrument specified the means by which the settlor could revoke or amend; if so, whether the specified means was followed; or whether the subsequent will or codicil simply made a general disposition of the decedent’s estate without making a specific reference to the trust or its assets. See, e.g., *In re Last Will and Testament of Tamplin*, 48 P.3d 481 (Alaska 2002) (not allowed); *In re Estate of Furst*, 55 P.3d 664 (Wash. App. 2002) (not allowed); *One Valley Bank, Nat. Ass’n v. Hunt* 516 S.E.2d 516 (W. Va. 1999) (not allowed); *In re Estate of Davis*, 671 NE 2d 1302 (Ohio Ct. App. 1996) (allowed); *Estate of Sanders*, 929 P.2d 153 (Kan. 1996) (not allowed); *In re Estate of Lowry*, 418 N.E.2d 10 (Ill. App. 1981) (allowed); *Conn Gen’l Life Ins Co*, 262 N.W.2d 403 (Minn. 1977) (not allowed); *Estate of Kovalyshyn*, 343 A.2d 852 (N.F. 1975) (not allowed). See also RESTATEMENT (THIRD) OF TRUSTS § 63 cmt. h (2003); RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 7.2 cmt e (2003); John P. Ludington, Annotation, *Exercise by Will of Trustor’s Reserved Power to Revoke or Modify Inter Vivos Trust*, 81 A.L.R. 3d 959 (1977).

<sup>75</sup> See RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 4.1 cmt. j. (1999). For a statute reversing that common law presumption, see OHIO REV. CODE ANN. § 2107.26 (West 2007).

<sup>76</sup> For a case in which the argument was made that the lost will presumption should be applied to a revocable trust, see *In re Estate and Trust of Pilafas*, 836 P.2d 420 (Ariz. App. 1992). In *Pilafas*, the court held that because the settlor had reserved the right to revoke the trust by a written instrument delivered to the trustee, he could not revoke it by physical act. *Id.* at 425. Consequently, the court did not decide whether the lost will presumption could be applied to a revocable trust. *Id.*

Most, if not all, jurisdictions have statutes under which provisions in a will for a spouse are revoked by a divorce or annulment of the marriage.<sup>77</sup> Such statutes are based on the assumption that a testator most likely would not intend for her former spouse to take under her will. If she did not revoke or revise her will to delete provisions in favor of her former spouse, the assumption is that the reason she did not do was oversight, inadvertence, or procrastination. Consistent with that rationale being equally applicable to revocable trusts, at least two courts have applied such wills statutes to revocable trusts.<sup>78</sup> Neither court, however, broadly held that the jurisdiction's revocation-by-divorce wills statute applied to revocable trusts.<sup>79</sup> While the preferable approach clearly is for legislation specifically applying to revocable trusts (and other will substitutes),<sup>80</sup> under the Restatement wills revocation-by-divorce statutes ordinarily should be applied to revocable trusts.<sup>81</sup>

**C. Lapse; Antilapse Statutes.** In the absence of a statute to the contrary, if a will devisee predeceases the testator, the gift lapses (i.e., fails).<sup>82</sup> Thus, unless the will provides otherwise, the devisee's gift is conditioned on the devisee surviving the testator. If the jurisdiction's antilapse statute applies, generally the gift will pass to the predeceased devisee's descendants, by representation.<sup>83</sup> By contrast, generally, at common law, a condition of survivorship is not implied on a gift of a future interest in trust.<sup>84</sup> Rather, upon creation of a trust, its remainder beneficiaries receive interests that, unless the instrument provides otherwise,<sup>85</sup> pass as a part of the remainder beneficiary's estate to her intestate heirs or will devisees.<sup>86</sup> When a revocable trust is used as a will substitute and a remainder beneficiary dies before the settlor, the question is thus raised

<sup>77</sup> See RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 4.1, rptr. notes (1999).

<sup>78</sup> *Miller v. First Nat. Bank & Trust Co.*, 637 P.2d 75 (Okla.1981); *Clymer v. Mayo*, 473 N.E.2d 1084 (Mass. 1985).

<sup>79</sup> In *Miller*, the court found that a pour over provision in favor of the trust in the decedent's will incorporated the trust by reference into the will. *Miller*, at 77-78. In *Clymer*, the court relied on the fact that the trust was unfunded (other than by being designated as the beneficiary of an insurance policy on the settlor's life and as the beneficiary of the settlor's retirement plan interest) in finding that the legislative intent with respect to the revocation-by-divorce wills statute was equally applicable to the trust. *Clymer*, at 1093. See generally, Susan N. Gary, *Applying Revocation-on-Divorce Statutes to Will Substitutes*, 18 QUINNIPIAC PROB. L.J. 83 (2004).

<sup>80</sup> See, e.g., UNIF. PROBATE CODE § 2-804 (1990).

<sup>81</sup> RESTATEMENT (THIRD) OF TRUSTS § 25 cmt. e(1) (2003).

<sup>82</sup> See RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 5.5 cmt. a (1999).

<sup>83</sup> See, e.g., UNIF. PROBATE CODE § 2-603 (1990).

<sup>84</sup> See JESSE DUKEMINIER, STANLEY M. JOHANSON, et. al., WILLS, TRUSTS, AND ESTATES, at 638 (7<sup>th</sup> ed. 2005).

<sup>85</sup> In *Burkett v. Capovilla*, 5 Cal.Rptr.3d 817 (Cal. App. 2003), a revocable trust instrument, on a form prepared by a paralegal service, provided that upon the settlor's death, certain trust assets were to be distributed to the settlor's daughter. *Id.* at 818-19. A subsequent provision in the instrument provided that: "For all gifts under this instrument, the beneficiary must survive for sixty (60) days before entitlement to such gifts." *Id.* at 819. Applying a California statute under which the same rules of interpretation are applied to wills and trusts, the court rejected the argument that because trust beneficiaries acquire an interest in the trust immediately on its creation, the 60 day period should run from the date the trust was created. *Id.* at 820-21. Rather, the court construed the survivorship condition to require that the daughter survive the settlor by 60 days. *Id.* at 821.

<sup>86</sup> See, e.g., *First Nat'l Bank v. Anthony*, 557 A.2d 957 (Me.1989).